Supreme Court, U.S.
FILED

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No. ____

In The
SUPREME COURT OF THE UNITED STATES

James P. Rutti, Jr. *Petitioner*,

v.

State of Wyoming, *Respondent*.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of Wyoming

PETITION FOR A WRIT OF CERTIORARI

Lori L. Brand
Gay Woodhouse Law Office, P.C.
211 W. 19th St., Ste. 308
Cheyenne, WY 82001
(307) 432-9399

Counsel of Record
Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I. Whether state criminal statute defining "child pornography" is unconstitutional as violative of the First Amendment rendering Petitioner's conviction for delivery of "child pornography" invalid in light of this Court's ruling in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) striking down an identical federal statute.

II. Whether Petitioner's Sixth Amendment right to effective assistance of counsel and the Due Process Clause of the Fourteenth Amendment were violated when the Wyoming Supreme Court twice denied him the right to make a factual evidentiary record to support his appellate claims of ineffective assistance of counsel and misstated and misapplied this Court's holdings addressing ineffective assistance of counsel in reaching its determinations.

LIST OF PARTIES

Pursuant to Rule 14.1(b), all parties to this Petition appear in the caption of the case on the cover page. Petitioner, James P. Rutti, Jr. was Appellant below. The State of Wyoming was Appellee below. The Wyoming Attorney General is Patrick J. Crank.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, James P. Rutti, Jr. respectfully requests that this Court grant the petition for a writ of certiorari, seeking review of the decision of the Wyoming Supreme Court entered on November 8, 2004.

OPINIONS BELOW

The opinion of the Wyoming Supreme Court (App. A, *infra)* is reported at 100 P.3d 394 (Wyo. 2004). The Order of the Wyoming Supreme Court Denying Petitioner's Motion for Rehearing (App. B, *infra)* is unreported. The Judgment and Sentence of the District Court (App. C *infra)* is unreported. The Order of the Wyoming Supreme Court Denying Petitioner's Motion for Partial Remand to make evidentiary record (App. D *infra*) is unreported. The Order of the Wyoming Supreme Court Denying Petitioner's Motion to Reconsider Denial of Partial Remand and Order Denying Renewed Motion for Partial Remand (App. E *infra*) is unreported.

JURISDICTION

The Wyoming Supreme Court's Opinion was entered on November 8, 2004. A timely Petition for Rehearing was denied on December 14, 2004. The instant Petition is filed within 90 days of the date the Petition for Rehearing was denied. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) on the grounds that Petitioner's First Amendment, Sixth Amendment, and Fourteenth Amendment rights have been violated.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

Wyoming State Constitution, Article I, Section 37:

Constitution of United States supreme law of land.
The State of Wyoming is an inseparable part of the federal union, and the constitution of the United States is the supreme law of the land.

STATUTORY PROVISIONS INVOLVED IN THIS CASE

Wyo. Stat. Ann. § 6-4-303(a)(ii)(B)(C)(D):

(ii) "Child pornography" means any visual depiction, including any photograph, film, video, picture, computer or computer-generated image or picture, whether or not made or produced by electronic, mechanical or other means, of explicit sexual conduct, where:

* * *

(B) The visual depiction is, or appears to be, of a child engaging in explicit sexual conduct;

(C) The visual depiction has been created, adapted or modified to appear that a child is engaging in explicit sexual conduct; or

(D) The visual depiction is advertised, promoted, described or distributed in a manner that conveys the impression that the material is, or contains, a visual depiction of a child engaging in explicit sexual conduct.

Wyo. Stat. Ann. § 6-4-303(b)(iii):

b) A person is guilty of sexual exploitation of a child if, for any purpose, he knowingly:

* * *

(iii) Manufactures, generates, creates, receives, distributes, reproduces, delivers or possesses with the intent to deliver, including through digital or electronic means, whether or not by computer, any child pornography;

STATEMENT OF THE CASE

A. Relevant Procedural Facts:

On May 20, 2002, weeks after this Court's ruling in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (April 14, 2002), Petitioner pleaded guilty to two criminal charges upon the advice of his appointed public defender. The criminal conviction at issue in the instant petition was for violation of Wyoming's Sexual Exploitation of a Child statute, Wyo. Stat. Ann. § 6-4-303(b)(iii), for delivery of "child pornography." (App. C *infra*). "Child pornography" is defined by Wyo. Stat. Ann. § 6-4-303(a)(iii)(A-D). Wyoming's criminal statute defining child pornography is virtually identical to the provisions of the Child Pornography Prevention Act of 1996, 18 U.S.C.A. §§ 2256(8)(B) & (D) struck down by this Court in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (April 14, 2002) as violative of the First Amendment.

After entering his guilty plea, on October 9, 2002, Petitioner moved *pro se* to withdraw the plea prior to sentencing, stating in an affidavit that he felt coerced by appointed trial counsel into entering the plea and that trial counsel was unfamiliar with the facts and the law of the case and had informed Petitioner that he would not put on any form of defense. (App. A. ¶ 6 *infra).* After appointment of alternative counsel, Petitioner's Motion to Withdraw the Guilty Plea was denied and the Court entered its written Judgment and Sentence on Petitioner on January 6, 2003. (App. C *infra).*

Petitioner filed his timely appeal to the Judgment and Sentence on January 8, 2003. On July 15, 2003, Petitioner made his first Motion for Partial Remand to the Wyoming Supreme Court pursuant to the Court's holding in Calene v. State, 846 P.2d 679 (Wyo. 1993) to establish record evidence on appeal through an evidentiary hearing of his asserted ineffective assistance of counsel claims. Petitioner claimed that trial counsel was ineffective in failing to challenge the constitutionality of the applicable provisions of Wyo. Stat. § 6-4-303(a)(iii) premised upon this Court's ruling in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (April 14, 2002) and by urging him to plead guilty to such charge without investigation. Petitioner's Motion for Partial Remand was denied on August 5, 2003. (App. D *infra*). The Wyoming Supreme Court stated that the primary reason it was denying Petitioner's Motion for an evidentiary hearing to make the record to support his claim of ineffectiveness of counsel was that, "Appellant may attempt to challenge, as overbroad, that statute in this appeal"...

On August 29, 2003, Petitioner again moved the Wyoming Supreme Court to reconsider its denial of his Motion for Partial Remand and renewed his Motion for Partial Remand to make the evidentiary record attaching an affidavit of the Petitioner to the Motion attesting to events with his appointed trial counsel. (App. F. *infra*). In the Affidavit, Petitioner averred that none of his appointed public defenders had ever received a copy of the disk or viewed the picture that constituted the crime for which he was charged and advised to plead guilty, which according to the original allegations of the State contained a photo of a young woman that *appeared to be* a minor. Petitioner further averred that he had heard about this Court's

Ashcroft decision while in jail awaiting trial and had specifically asked his second public defender, Dion Custis about the constitutionality of the similar state statute under which he was charged. On that occasion, Mr. Custis stated that the Wyoming Supreme Court had already held the statute constitutional. [In fact, the Wyoming Supreme had never entertained a single case addressing the Sexual Exploitation of a Child Statute prior to Petitioner's case.]

Petitioner further averred in his affidavit in support of his second Motion for Partial Remand that on a later occasion, prior to pleading guilty, Petitioner showed Mr. Custis this Court's opinion in Ashcroft v. Free Speech Coalition striking down portions of the CPPA on the basis of the First Amendment and the applicable Wyoming statute and compared the language in the federal and state acts. Mr. Custis said, "that's a federal statute it doesn't mean anything" and indicated he was not going to investigate the issue.

On September 4, 2003, Petitioner filed his Opening Appellate Brief. On September 23, 2003, without explanation the Wyoming Supreme Court again denied Petitioner's Motion for Remand to create an evidentiary record to support his appellate claims of ineffective assistance of counsel. (App. E *infra*).

Accordingly, Petitioner moved the Wyoming Supreme Court to allow him to file a supplemental brief of an additional issue, which Motion the Court granted. Thus, on November 20, 2003, Petitioner filed a supplemental brief addressing the issue of whether "The Wyoming Supreme Court's Calene hearing procedure, established to provide evidentiary record supplementation for ineffective assistance of counsel claims, as currently applied by the Court adequately protects and Appellant's Constitutional right to Due Process and/or his Sixth Amendment right to effective assistance of trial and appellate counsel."

At the close of all appellate briefing and following oral argument, the Wyoming Supreme Court issued its opinion affirming the Judgment and Sentence of the District Court on November 8, 2004. (App. A *infra*) Petitioner's Petition for Rehearing was denied on December 14, 2004. (App. B *infra*).

B. The Wyoming Supreme Court's Opinion:

i. Unconstitutionality of Wyo. Stat. Ann. § 6-4-303(b)(iii).

The Wyoming Supreme Court rejected Petitioner's challenge to the constitutionality of Wyo. Stat. Ann. § 6-4-303(b)(iii) and its incorporated definitional sections, Wyo. Stat. Ann. § 6-4-303(a)(ii)(B-D). The Wyoming Supreme Court's opinion finding the applicable criminal statute penalizing delivery of child pornography constitutional on its face, was premised upon a falsehood belied by the opinion itself. The Court refused to address the issue squarely before it challenging the statute on the basis of this Court's First Amendment holding in Ashcroft v. Free Speech Coalition by simply stating that: "Rutti has argued only that § 6-4-303 is facially overbroad. ***He has presented no argument as to the constitutionality of any specific portion of § 6-4-303*** so we do not consider the same in this appeal. Our determination that § 6-4-303 is not facially broad ends our discussion." (Rutti v. State, App. A *infra* at ¶ 19)(emphasis added).

Though the Wyoming Supreme Court recognized that the State of Wyoming conceded that the pertinent definitional sections of Wyo. Stat. § 6-4-303(a)(ii) were "very similar to the corresponding language in the federal statute found unconstitutional by the United States Supreme Court in *Free Speech Coalition*" the Court refused to pass on the issue presented to it by Petitioner.[1] Instead, the Wyoming Supreme Court stated, "although unconstitutional provisions of a state statue are judicially severable if it were to become necessary, it is preferable if § 6-4-303 received the

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[1] In fact, the State of Wyoming stated explicitly in its appellate briefing responding to Appellant's arguments: "The State acknowledges that the holding in Ashcroft extends to the identical language in the definition contained in Wyo. Stat. Ann. § 6-4-303." Appellee's Brief at 13. "In conclusion, Ashcroft v. Free Speech Coalition struck down a part of 18 U.S.C. § 2251 et seq., ***and by implication a part of Wyo. Stat. Ann. § 6-4-303.***" Appellee's Brief at 17 (emphasis added).

urgent attention of the Wyoming Legislature." (Rutti v. State, App. A *infra* at ¶ 19).[2]

As this Court can see by a glancing review of the Wyoming Supreme Court's opinion, and as the state court wrote:

> On appeal, Rutti makes multiple claims of error. First, Rutti was charged with sexual exploitation of a child under Wyo. Stat. Ann. § 6-4-303(b)(iii)(LexisNexis 2003) [FN1] for delivering child pornography. Rutti argues that § 6-4-303(b)(iii) is facially overbroad and thus violates the First Amendment to the United States Constitution.

(Rutti v. State, App. A *infra* at ¶ 1).

When the Court lists the issues Petitioner presented it quotes: "Whether Appellant's conviction for violation of Wyo. Stat. § 6-4-303(b)(iii) must be vacated because it is unconstitutional as violative of the First Amendment to the U.S. Constitution." (Rutti v. State, App. A *infra* at ¶ 2). Lastly, when the Wyoming Supreme Court begins its discussion, it labels its analysis as "Constitutionality of § 6-4-3030(b)(iii)." (Rutti v. State, App. A *infra* at ¶ 9). It then states, "Rutti's challenge to the facial validity of Wyo. Stat. § 6-4-303(b)(iii) as overbroad and violative of the First Amendment presents an issue of law." (Rutti v. State, App. A *infra* at ¶ 9).

Though quoting the issues and arguments squarely presented to it by Petitioner above, the Wyoming Supreme Court nonetheless opines:

> Rutti argues that the definitional provisions found unconstitutional by the United States Supreme Court in *Free Speech Coalition* are nearly identical to the corresponding definitional provisions in Wyoming's statue and therefore Wyoming's statute should be

[2] The Wyoming Legislature ended its 2005 legislative session on March 3, 2005. The sole bill relating to Wyo. Stat. Ann. § 6-4-303 authorized issuance of administrative subpoenas to investigate sexual exploitation of children via the Internet. No changes to the language of the statute were suggested.

> struck down as overbroad. Rutti presents no argument specifically challenging the corresponding two definitional provisions in the Wyoming statue. ***Rutti only argues that the entire statue is facially overbroad. Thus, this appeal presents this Court with no occasion to determine if any particular provision of § 6-4-303 is unconstitutionally overbroad. Since courts will not pass upon constitutional questions unless necessary, our only concern in this appeal is with the Wyoming statute as a whole."***

(Rutti v. State, App. A *infra* at ¶ 13)(emphasis added)(internal citations omitted).

Ultimately, the Wyoming Supreme Court did not squarely address the Constitutional issue clearly presented to it by the Petitioner, premised on this Court's holding that language identical to that included in Wyoming's Sexual Exploitation of a Child statute violated the First Amendment, as conceded by the State of Wyoming. Instead it deliberately and erroneously mischaracterized Petitioner's challenge to justify its failure to apply its own First Amendment holdings that, "this Court has a duty to declare legislative enactments invalid if they transgress [the First Amendment]." (Rutti v. State, App. A *infra* at ¶ 11)(internal citations omitted).

ii. Ineffective Assistance of Counsel Claims.

The Wyoming Supreme Court rejected Petitioner's Sixth Amendment challenge alleging ineffective assistance of trial counsel. The Court first noted that Petitioner alleged that the record on appeal was insufficient for the Court to accurately determine whether his attorneys had effectively represented him and therefore the Court should remand the case to the trial court for an evidentiary hearing on the issue. The Court then stated that the Court's denial of Petitioner's Motions for remand formed the basis for his fifth and supplemental issue; thus, the Court would address it within its analysis. (Rutti v. State, App. A *infra* at ¶ 20).

Ultimately, in determining Petitioner's Sixth Amendment claims, his allegations of error in refusing to allow him to create the appellate record to support his Sixth Amendment claims, and his allegations that the Wyoming Supreme Court's application of its Calene hearing partial remand procedure were a violation of Due Process for Wyoming criminal defendants asserting Sixth Amendment claims, the Wyoming Supreme Court did not address the first prong of this Court's ineffectiveness of counsel analysis announced in Strickland v. Washington, 466 U.S. 668, 104 S.Ct.2052, 80 L.Ed.2d 674 (1984). Thus, the Wyoming Supreme Court never addressed the deficiencies of trial counsel alleged by Petitioner in making his ineffective assistance of counsel arguments.

Nowhere within its opinion did the Wyoming Supreme Court outline the actual allegations sworn to by the Petitioner in his affidavit wherein Petitioner quoted his attorney's responses to his multiple attempts to challenge the constitutionality of the statute under which he was charged. Nowhere within its opinion did the Wyoming Supreme Court address whether it constitutes deficient performance by counsel to inform a criminal defendant that the Wyoming Supreme Court had held a criminal statute constitutional, when the issue had never been addressed. Nowhere within its opinion did the Wyoming Supreme Court address whether it constitutes deficient performance by counsel to say that a United States Supreme Court opinion striking down a statute on the basis of the First Amendment does not apply to state law, because "that's federal and this is state. (App. F *infra).* Nowhere within its opinion did the Wyoming Supreme Court address whether undertaking no investigation or analysis of the applicable law when urging a criminal defendant to plead guilty to the charge constitutes deficient performance by trial counsel.

Instead, the Wyoming Supreme Court decided all of Petitioner's Sixth Amendment claims solely on the issue of whether any deficient performance by counsel had prejudiced the Defendant. (Rutti v. State, App. A *infra* at ¶ 26). In doing so, the Wyoming Supreme Court purported to apply this Court's holding in Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L.Ed.2d 203 (1985), wherein it was held that:

> The second, or "prejudice," requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, ***the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.***
>
> * * *
>
> In the present case the claimed error of counsel is erroneous advice as to eligibility for parole under the sentence agreed to in the plea bargain. App. 31. We find it unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner's allegations are insufficient to satisfy the *Strickland v. Washington* requirement of "prejudice." Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial. ***He alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty***. Indeed, petitioner's mistaken belief that he would become eligible for parole after serving one-third of his sentence would seem to have affected not only his calculation of the time he likely would serve if sentenced pursuant to the proposed plea agreement, but also his calculation of the time he likely would serve if he went to trial and were convicted.

Id. at 60 (emphasis added).

However, in announcing its new interpretation of this Court's Hill v. Lockhart holding, the Wyoming Supreme Court held that to show prejudice a criminal defendant who entered a guilty plea on advice of counsel must demonstrate: "That there is a reasonable probability that, but for counsel's errors, he would not have pled guilty, would have insisted on going to trial, ***and the results of the trial would have been more advantageous than the results of the plea agreement.***"[3] (Rutti v. State, App. A *infra* at ¶¶ 23, 24, 25, 28, 31, 32).

The Wyoming Supreme Court then applied its new holding to Petitioner's case and ultimately decided that: "The definitive problem with Rutti's ineffective assistance of counsel claims is that he has not presented any objectively plausible argument supporting the prejudice prong. ***Rutti does not argue that 'absent the error, the outcome of trial would have been more advantageous to the client than the result of his plea.***'"(Rutti v. State, App. A *infra* at ¶28)(emphasis added).

The Court again erroneously stated that: "In his affidavit submitted to this Court in support of his motion for partial remand Rutti does not even make a claim that he would not have accepted the guilty plea agreement had his counsel's performance been different let alone that the outcome of the proceedings would have been more favorable to him." (Rutti v. State, App. A *infra* at ¶¶ 28, 31).

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[3] As the Wyoming Supreme Court noted in its opinion, and as relied upon by Petitioner in bringing his claim, the Court had previously interpreted this Court's Hill v. Lockhart holding to state: "The defendant may also establish the necessary prejudice by proof of circumstances indicating that, in deciding whether or not to plead guilty, he placed special emphasis on the challenged aspect of his attorney's advice. He must suggest to the reviewing court a plausible reason why, had his representation been as he claims it should have been he would have chosen to forsake the benefits of the plea agreement for the risks of trial." Lower v. State, 786 P.2d 345, 349-350 (Wyo. 1990)(citing Hill v. Lockhart, 474 U.S. 52 (1985); and "Under certain circumstances the defendant is not required to demonstrate a probability that the result of the trial would be different, but instead must only demonstrate that there is a reasonable probability that he would not have entered the plea except for the errors made by counsel." Brock v. State, 981 P.2d 465, 469 (Wyo. 1999)(citing Hill v. Lockhart, 474 U.S. 52 (1985)).

On this basis, the Court denied Petitioner's claims that the record was insufficient to determine his Sixth Amendment claims because "an evidentiary hearing is only required when serious and specific allegations are sufficiently stated to show a real and substantial issue. A substantial issue regarding legal ineffective assistance of counsel only exists when serious and specific allegations are presented supporting both prongs of the Strickland test for ineffectiveness." (Rutti v. State, App. A *infra* at ¶27.)

The Wyoming Supreme Court then refused to address Petitioner's supplemental issue on whether its application of the evidentiary remand procedure violates Due Process stating: "the allegations Rutti has presented to this Court, even if true, simply do not support a claim of ineffective assistance of counsel. Further, because this case ***does not present even a close argument on whether a remand is required, we determine that it is not appropriate for this Court to use this appeal to analyze the remand procedure generally. Thus, we will not further address Issue V as presented by Rutti.*** (Rutti v. State, App. A *infra* at ¶¶ 29)(emphasis added).

REASONS FOR GRANTING THE WRIT

A. Introduction and Summary

This petition has as its focus the important question of whether the Wyoming Supreme Court is required to follow this Court's jurisprudence in regard to the interpretation of the Constitution of the United States as applied to the rights afforded the state's criminal defendants. Rather than correctly stating and applying this Court's holdings on the First Amendment addressing criminal statutes, the Wyoming Supreme Court deliberately ignored the constitutional issue squarely presented to it by Petitioner, and conceded by the State of Wyoming. Instead, the Court abdicated its judicial duty to strike down a criminal statute identical to one already stricken by this Court on the basis of the First Amendment and bizarrely urged the Wyoming Legislature to urgently address the challenged language of the statue. This holding has the effect of elevating the legislators of the State of Wyoming above the United

States Supreme Court in regard to interpreting the Constitution of the United States.

Likewise, the Wyoming Supreme Court routinely fails to correctly apply this Court's jurisprudence in regard to ineffective assistance of counsel claims and a criminal appellant's rights to create a sufficient factual evidentiary record to support his Sixth Amendment claims. Instead, the Wyoming Supreme Court misinterprets and misstates this Court's holdings to raise the announced evidentiary standards to such levels that criminal appellants are denied not only their rights to effective assistance of trial counsel, but to effective assistance of appellate counsel as well.

Accordingly, this case presents two of the traditional bases for the exercise of this Court's discretion in granting a Writ of Certiorari as found in Rule 10. This case presents a question sufficiently important to review because the lower court's decision in regard to the constitutionality of its criminal statute defining child pornography is directly in conflict with this Court's rule announced in Ashcroft v. Free Speech Coalition and therefore its decision is in error. Likewise, its Sixth Amendment decisions are in conflict with the law announced by this Court in multiple cases establishing the parameters of a criminal defendant's rights to effective assistance of counsel in mounting a defense to a criminal charge and how that issue may be presented on direct appeal.

Integrated with these bases is the fact that this case calls for this Court's supervisory powers for guidance and its authoritative voice in effectuating the purpose behind its constitutional rules because the Wyoming Supreme Court's decisions have the consequence of effectively vitiating the constitutional rights of Wyoming criminal defendants which limited federal post-conviction remedies cannot cure. Therefore, for all of the foregoing reasons, Petitioner would respectfully request that the Court grant his petition for a writ of certiorari to review the decision of the Wyoming Supreme Court.

B. The Wyoming Supreme Court's decision below is in direct conflict with this Court's holdings in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), and Ashcroft

v. American Civil Liberties Union, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004).

In determining Petitioner's challenge to the constitutionality of Wyo. Stat. § 6-4-303(b)(iii), the Wyoming Supreme Court disposed of the issue without squarely addressing it on its merits, though presented with a explicit concession by the State of Wyoming premised on this Court's holding in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002). The lower court refused to address the issue presented to it through incorrectly alleging in multiple instances that Petitioner Rutti had challenged the entire criminal statute as a whole rather than any particular subsection.

The Court's opinion erroneously states: "Rutti claims that § 6-4-303 is overbroad and therefore facially unconstitutional under the First Amendment of the United States Constitution." (Rutti v. State, App. A *infra* at ¶10). "Rutti only argues that the entire statute is facially overbroad. Thus, this appeal presents this Court with no occasion to determine if any particular provision of Wyo. Stat. § 6-4-303 is unconstitutionally overbroad." (Rutti v. State, App. A *infra* at ¶13). "Thus, contrary to Rutti's argument, the mere application of the *Free Speech Coalition* decision does not render § 6-4-303 void as facially overbroad under the First Amendment." (Rutti v. State, App. A *infra* at ¶ 15). "Despite the lack of argument by Rutti, we will continue the analysis and determine if, under Wyoming law, § 6-4-303 should be struck down in its entirety if certain definitional provisions were determined to be unconstitutional." (Rutti v. State, App. A *infra* at ¶ 16); and "Severability, then, is the general rule; and Rutti makes no argument that § 6-4-303 is indivisible." Id.

Ultimately, the Court disposed of the issue by concluding:

> We emphasize that Rutti has argued only that § 6-4-303 is facially overbroad. ***He has presented no argument as to the constitutionality of any specific portion of § 6-4-303 so we do not consider the same in this appeal. Our determination that § 6-4-303 is not facially overbroad ends our discussion***...although unconstitutional provisions of a state statue are judicially severable if it were to

become necessary, it is preferable if § 6-4-303 received the urgent attention of the Wyoming Legislature." (Rutti v. State, App. A *infra* at ¶ 19).[4]

The Court's statements that Petitioner challenged only Wyo. Stat. § 6-4-303 in its entirety and not any specific provisions, are simply wrong and are even belied by the opinion itself! In ¶ 1 the Court states, "On appeal, Rutti makes multiple claims of error…Rutti argues that ***§ 6-4-303(b)(iii) is facially overbroad and thus violates the First Amendment to the United States Constitution."*** In ¶ 2, the Court recites the issues as stated by Petitioner. Issue I is: "Whether Appellant's conviction for violation of ***Wyo. Stat. § 6-4-303(b)(iii)*** must be vacated because it is unconstitutional as violative of the First Amendment to the U.S. Constitution." In ¶ 9, the Court titles the issue to be discussed: "***Constitutionality of § 6-4-303(b)(iii).***" Also in ¶ 9, the Court states, "***Rutti's challenge to the facial validity of § 6-4-303(b)(iii)*** as overbroad and violative of the First Amendment presents an issue of law." In ¶ 13, the Court recognizes that, "Rutti argues that the definitional provision found unconstitutional by the United States Supreme Court in *Free Speech Coalition* are nearly identical to the corresponding definitional provisions in Wyoming's statute and therefore Wyoming's statute should be struck down as overbroad." In ¶ 18 it states, "This Court determines that ***the provisions of § 6-4-303 that are the subject of Rutti's protests would be severable if they were found to be unconstitutional."*** (emphasis added).

In addition to the portions of the Wyoming Supreme Court's opinion which belie its statements that Petitioner challenged the statute only in its entirety rather than any specific portions thereof, the Court's statements are further shown as clear and fundamental error by the Appellant's and Appellee State of Wyoming's written briefs and the oral argument held before the Wyoming Supreme Court on May 4, 2004.

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[4] The Wyoming Legislature ended its 2005 legislative session on March 3, 2005. The sole bill relating to Wyo. Stat. Ann. § 6-4-303 authorized issuance of administrative subpoenas to investigate sexual exploitation of children via the Internet. No changes to the language of the statute were suggested.

On page 9-10 of Petitioner's opening appellate brief, he argued:

> On April 16, 2002, the United States Supreme Court in a 5-2-2 decision determined that two specific subsections of the Child Pornography Prevention Act of 1996 ("CPPA") violated the First Amendment to the United States Constitution because they were overbroad as reaching a substantial amount of protected non-obscene speech. Ashcroft, Attorney General et al. v. Free Speech Coalition, et. al., 535 U.S. 234, 122 S.Ct. 1389 (2002). The language of the Child Pornography Prevention Act of 1996 (CPPA) found unconstitutional made it a crime to publish, possess... "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or ***appears to be***, of a minor engaging in sexually explicit conduct," 18 U.S.C. § 2256(8)(B) and to publish possess. . . any sexually explicit image that is, "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" it depicts "a minor engaging in sexually explicit conduct" 18 U.S.C. 2256(8)(D). Id. at 1392-93. (emphasis added***). This language already determined violative of the First Amendment is identical or nearly identical to that of Wyo. Stat. §§ 6-4-303(ii)(B), C, & (D) defining child pornography wherein it appears that the Wyoming statute was modeled on the federal.***

Likewise, the Petitioner expressly challenged the constitutionality of Wyo. Stat. § 6-4-303(b)(iii) in multiple pages of his opening brief: "In the instant case, Appellant challenges Wyo. Stat. § 6-4-303(b)(iii) as facially overbroad." Id. at 14. "In light of these rules of law, Wyoming Statute § 6-2-303(b)(iii) must likewise be recognized by this Court as enacted in violation of the First Amendment by reaching conduct already determined to be substantially protected by the United States Constitution and therefore invalidated." Id. at 16.

Appellee State of Wyoming had no difficulty in determining Appellant's issues and argument were challenges to specific subsections of Wyo. Stat .§ 6-4-303. In its brief, the State writes: "Appellant first argues that his conviction for violation of Wyo. Stat. Ann. § 6-4-303(b)(iii) is invalid because the United States Supreme Court determined in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), that an ***identical federal statute defining "child pornography" was violative of the First Amendment, and therefore, unconstitutional. (Appellant's Brief, pp. 9-11, 14-17.)"*** Appellee's Brief at 8 (emphasis added).

Furthermore, the Petitioner in his appellate reply brief responding to the arguments raised by the State of Wyoming again makes clear that he challenges Wyo. Stat. § 6-4-303(b)(iii) as based upon the definitional sections of the statute, 6-4-303(a)(ii)(B)(C) & (D) which are identical and nearly identical to those found unconstitutional by the U.S. Supreme Court in Ashcroft v. Free Speech Coalition. See Appellant's Reply Brief at 1, 2, 3.

The Wyoming Supreme Court initially erred by determining that it need not decide the issue of the constitutionality of Wyo. Stat. § 6-4-303(a)(ii)(B-D) and Wyo. Stat. § 6-4-303(b)(iii) by simply incorrectly alleging that Petitioner had not challenged these provisions but only, "the statute as a whole."[5] The Court's errors are compounded by misstatement and misapplication of this Court's First Amendment precedent. The Court's opinion for which review is sought was issued on November 8, 2004, yet it failed to even cite the most recent U.S. Supreme Court opinion on the First Amendment decided June 29, 2004, while Petitioner's case was pending under advisement.

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[5] See also Appellant's Motion for Partial Remand filed July 15, 2003 at 2-3 and this Court's Order Denying Motion for Partial Remand filed August 5, 2003: "Having fully considered the motion and the file, the Court finds that the thrust of this motion seems to be that counsel was ineffective in failing to challenge as overbroad, "the constitutionality ***of portions of the Wyoming statute*** prohibiting sexual exploitation of children, Wyo. Stat. Ann.§ 6-4-303." (App. D *infra*) (emphasis added).

In Ashcroft v. American Civil Liberties Union, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004), this Court affirmed injunctive relief holding that Internet content providers and civil liberties group challengers were likely to prevail on their claim that Child Online Protection Act (COPA) violated the First Amendment by burdening adults' access to some protected speech. In doing so, this Court held:

> The imperative of according respect to the Congress, however, does not permit us to depart from well-established First Amendment principles. ***Instead, we must hold the Government to its constitutional burden of proof. Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat the Constitution demands that content-based restrictions on speech be presumed invalid***, R.A.V. v. St. Paul, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), ***and that the Government bear the burden of showing their constitutionality***. United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 817, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). This is true even when Congress twice has attempted to find a constitutional means to restrict, and punish, the speech in question.
>
> Id. at 2788 (emphasis added).

I

In contrast to this Court's approach in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) and Ashcroft v. American Civil Liberties Union, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004), the Wyoming Supreme Court refuses to address the constitutionality of the challenged statutes on their merits even when conceded by the State of Wyoming. As the lower court recognizes in its opinion at ¶ 19, the State of Wyoming ***concedes*** the issue that Ashcroft v. Free Speech Coalition struck down the identical language found in Wyo. Stat. § 6-4-303(a)(ii)(B) and (D): "The State acknowledges that the holding in Ashcroft extends to the identical language in the definition contained in Wyo. Stat. Ann. § 6-4-303." Appellee's Brief at 13. "In conclusion, Ashcroft v. Free Speech Coalition struck down

a part of 18 U.S.C. § 2251 et seq., ***and by implication a part of Wyo. Stat. Ann. § 6-4-303."*** Appellee's Brief at 17.

If the State of Wyoming through its Attorney General has conceded the issue of the unconstitutionality of certain specific portions of Wyo. Stat. § 6-4-303 challenged by the Petitioner—on what legal basis can the Wyoming Supreme Court refuse to give effect to the State's concession? As the lower court recognizes in its opinion in regard to the First Amendment, "***this Court has a duty to declare legislative enactments invalid if they transgress that constitutional provision.***" Rutti v. State, 2004 WY 133 ¶ 11 (quoting Miller v. City of Laramie, 880 P.2d 594, 597 (Wyo. 1994)).

In this case, the lower court's failure to do its judicial duty is pure legal error as the State of Wyoming has conceded that it cannot meet its constitutional burden of proof under the First Amendment as to the Wyoming statutes identical to those at issue in Ashcroft v. Free Speech Coalition.[6] As a practical matter, how many more Wyoming criminal convictions brought pursuant to the Sexual Exploitation of a Child statute will be rendered constitutionally suspect by the lower court's abdication while this case winds its way through the federal courts before the definitional subsections are ultimately invalidated on the basis of the First Amendment?

Petitioner would respectfully request that this Court step in through its supervisory role, grant the petition and summarily invalidate the provisions of Wyoming's criminal statute which are identical to those stricken in Ashcroft v. Free Speech Coalition as violative of the First Amendment. Thereafter upon remand, the Wyoming Supreme Court must undertake the analysis of the images

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[6] In ¶¶ 15 and 16 of the Court's opinion, the Court erroneously finds fault with Petitioner because Petitioner "presents no argument regarding the severability of provisions of the Wyoming Statute. Despite the lack of argument by Rutti, we will continue the analysis and determine if, under Wyoming law, § 6-4-303 should be struck down in its entirety..." Again, Petitioner did not attack Wyo. Stat. § 6-4-303 in its entirety. Petitioner made no argument about severability because he presumed the statute was severable as is the general rule as recognized by the Court in ¶ 16. Instead, Petitioner attacked specific statutory subsections: Wyo. Stat .§ 6-4-303(a)(ii)(B)(C) & (D) as defined within, and Stat. § 6-4-303(b)(iii), thus rendering any severability argument unnecessary.

at issue in determining whether Petitioner's conviction may lawfully stand.[7]

C. The Wyoming Supreme Court's decision is in direct conflict with this Court's ineffective assistance of counsel jurisprudence.

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[7] The other cases that Petitioner found through research which affirm convictions for child pornography as defined by a similar statute following Ashcroft v. Free Speech Coalition seem to contain the images in question within the appellate record and involve the appellate court having viewed the images and declaring that they contain actual children. See e.g., U.S. v. Wolk, 337 F.3d 997, 1005 (8th Cir. 2003)("Moreover, these pictures are in the record. We have examined them. Upon review, we conclude the children depicted in these images were real.") United States v. Richardson, 304 F.3d 1061, 1064 (11th Cir.2002) (performing a plain error analysis and concluding the same); Hall v. U.S., 312 F.3d at 1260 (same); United States v. Pearl, 324 F.3d 1210, 1219 & n. 4 (10th Cir.2003) (Briscoe, J., dissenting) (same). U.S. v. Deaton, 328 F.3d 454 (8th Cir. 2003)("Having viewed the exhibits, we find no plain error); Griffin v. State, 77 P.3d 545 (Mont. 2003); State v. Hazlett, 73 P.3d 1258 (Ariz.App. Div. 1 2003)("The State failed to raise the issue of standing in the trial court and never made the particular images that are the subject of the indictments a part of the record. We are therefore unable to determine whether the images alleged to have been possessed by defendants are subject to First Amendment protection); State v. Bonner, 61 P.3d 611(Idaho App. 2002); People v. Alexander, 791 N.E.2d 506 (Ill. 2003).

Notwithstanding the fact that Petitioner's case involves a guilty plea, he asserts that his case is analogous to U.S. v. Ellyson, 326 F.3d 522, 531 (4th Cir. 2003) wherein the Court set aside the criminal conviction when the jury had been instructed on an unconstitutional ground that stating "There are other images contained on Ellyson's diskettes, however, with respect to which the government failed, at least on the record before us, to establish the use of an actual child victim...Because there is no way for us to determine the jury's basis for its verdict, we must set the verdict aside. Petitioner also directs the Court's attention to State v. Fingal, 666 N.W.2d 420 (Minn.App. 2003) wherein after determining the unconstitutionality of the state statute on the basis of Ashcroft v. Free Speech Coalition, and finding the statute severable ordered respondent State of Minnesota to file notice of intent to proceed under the surviving provisions of the statute.

None of the aforementioned procedural or evidentiary protections have occurred in Petitioner's case. The image at issue does not appear in the record, and it is unclear under which provision of the statute the State of Wyoming actually prosecuted the Defendant whether it be a constitutional or unconstitutional subsection. Accordingly, Petitioner would submit that his conviction under Wyo. Stat. § 6-4-303(b)(iii) should be vacated.

The Wyoming Supreme Court committed unconscionable legal errors in its opinion issued in Rutti v.State, 2004 WY 133, 100 P.3d 394 (Wyo. 2004) by denying Petitioner's fundamental right to establish a sufficient record on appeal, by misstating the law in regard to the showing required to establish ineffective assistance of counsel, and by misapplying the pertinent law to Petitioner's case. (App. A

In deciding Petitioner's Sixth Amendment claims, the lower court initially determines that it would disregard, except for a backhanded reference in footnote 8, the first prong of Petitioner's ineffective assistance of counsel claims asserting the deficient performance of his trial attorneys, and decide the claims solely on the second prong determining as a matter of law and without an evidentiary hearing that counsels' deficient performance did not prejudice Appellant. Accordingly, the Court fails to even consider the specific and serious allegations of deficiency made by Petitioner as stated and supported by two affidavits and a hearing transcript. Motion for Partial Remand and attachments filed July 15, 2003, and Motion to Reconsider Partial Remand and Renewal of Motion for Partial Remand and attachments filed August 29, 2003.

More importantly, in rendering its decision the Court admits that Petitioner was denied the opportunity to adequately make a record in support of his ineffective assistance of counsel claims by the Court's denial of his two Motions for Partial Remand. Id. at ¶ 27. The Court's refusal to allow Petitioner the right to establish a record in support of *both prongs* of his ineffective assistance of counsel claim is clear error in light of this Court's precedent on the issue.

> "When the state provides an appeal of right, ***the defendant-appellant has a right to an appellate record that is adequate to present his claims on appeal.*** *Mayer v. Chicago*, 404 U.S. 189, 194, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971)(emphasis added); *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); *Draper v. Washington*, 372 U.S. 487, 499, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963). That record must be sufficiently complete "to permit

proper consideration of [his] claims." *Mayer*, 404 U.S. at 194; *Draper*, 372 U.S. at 499.

Wyoming law provides that any claim of ineffective assistance of trial counsel must be raised in the direct appeal or is defaulted. Consequently, Wyoming must provide mechanisms to assure that the record is sufficiently complete "to permit proper consideration of" a claim of ineffective assistance of trial counsel. In this case, Petitioner has been deprived of ***his right*** to such a sufficient record.

As Petitioner argued to the Wyoming Supreme Court, this Court has reaffirmed its constitutional preference for a hearing before the District Court recognizing that ineffective assistance and the prejudice arising there from generally do not appear in the trial record and may require factual supplementation. In Massaro v. U.S., 123 S.Ct. 1690, 1695 (2003), the Court held:

> In light of the way our system has developed, in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective-assistance. ***When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose***. Under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a defendant claiming ineffective counsel must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial. The evidence introduced at trial, however, will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the Strickland analysis. If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel

had a sound strategic motive or was taken because the counsel's alternatives were even worse. See Guinan, supra, at 473 (Easterbrook, J., concurring) ("No matter how odd or deficient trial counsel's performance may seem, that lawyer may have had a reason for acting as he did .... Or it may turn out that counsel's overall performance was sufficient despite a glaring omission ..."). The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them. And evidence of alleged conflicts of interest might be found only in attorney-client correspondence or other documents that, in the typical criminal trial, are not introduced. See, e.g., Billy-Eko, 8 F.3d, at 114. ***Without additional factual development, moreover, an appellate court may not be able to ascertain whether the alleged error was prejudicial.*** Id. (emphasis added).

However, the Court commits its fundamental error in deciding Petitioner's Sixth Amendment claims in ¶ 23 of its opinion in Rutti v. State, 2004 WY 133, 100 P.3d 394 (Wyo. 2004) when it misstates the law regarding the prejudice that must be shown by a criminal appellant to prevail on his ineffective assistance of counsel claims. In ¶ 23, the Court holds in error: "To show prejudice, Rutti must demonstrate that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty, would have insisted on going to trial, ***and the results of the trial would have been more advantageous than the results of the plea agreement.***" Id. (emphasis added). See also Id. at ¶ 24: "The Lower court specifically held that one of the elements of prejudice is "whether, absent the error, the outcome of a trial would have been more advantageous to the client than the result of his plea." See also Id. at ¶ 25 "Thus, an objective showing of a reasonable probability that, but for the errors made by counsel, a defendant would not have accepted a plea bargain, ultimately rests on whether there is an objectively reasonable probability that the outcome at trial would have been more advantageous to the defendant." Id.

The Court's holdings are fundamental legal errors committed by requiring Petitioner to establish prejudice by trial counsel's deficient performance through a combined showing of alternative

methods to demonstrate prejudice announced by this Court. In Hill v. Lockhart, this Court expressly states, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 at 59-60, 106 S.Ct. 366 at 370-71, 88 L.Ed.2d 203 (1985). This Court then denied the defendant's prejudice claim in part by stating, that: "He alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty." Id. It is this language by this Court which led the Wyoming Supreme Court to hold over fourteen years ago that:

> The Defendant may also establish the necessary prejudice by proof of circumstances indicating that, in deciding whether or not to plead guilty, he placed special emphasis on the challenged aspect of his attorney's advice. He must suggest to the reviewing court a plausible reason, why, had his representation been as he claims he would have chosen to forsake the benefits of his plea agreement for the risks of trial." Lower v. State, 786 P.2d at 349-350.

The Wyoming Supreme Court has reaffirmed its Lower holding on multiple occasions, including in Brock v. State, 981 P.2d 465 (Wyo. 1999), wherein the court held that under certain circumstances, "the defendant is not required to demonstrate a probability that the result of the trial would be different, ***but instead must only demonstrate that there is a reasonable probability that he would not have entered the plea except for the presence of the errors made by counsel***."

In Roe v. Flores-Ortega, 120 S.Ct. 1029, 1039 (2000), this Court discussed its holding in Hill v. Lockhart stating:

> In ***Hill***, we considered an ineffective assistance of counsel claim based on counsel's allegedly deficient advice regarding the consequences of entering a guilty plea. ***Like the decision whether to appeal, the decision whether to plead guilty (i.e., waive trial) rested with the defendant and, like this case,***

> ***counsel's advice in Hill might have caused the defendant to forfeit a judicial proceeding to which he was otherwise entitled.*** We held that "to satisfy the 'prejudice' requirement [of *Strickland*], the defendant must show that ***there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."*** *Hill, supra,* at 59, 106 S.Ct. 366.

To Petitioner's knowledge, nowhere within this Court's jurisprudence has this Court held that *in addition to* showing that he would have insisted on going to trial to demonstrate prejudice—a criminal appellant must demonstrate that he would have received a more advantageous result at trial than by his guilty plea. However, the Wyoming Supreme Court decided all of Petitioner's Sixth Amendment claims against him by doing just that and holding him to a higher standard than authorized by the law:

> "The definitive problem with Rutti's ineffective assistance of counsel claims is that he has not presented any objectively plausible argument supporting the prejudice prong. Rutti does not argue that 'absent the error, the outcome of trial would have been more advantageous to the client than the result of his plea.'" (Rutti v. State, App. A *infra* at ¶ 23)

The Wyoming Supreme Court again erroneously states that: "In his affidavit submitted to this Court in support of his motion for partial remand Rutti does not even make a claim that he would not have accepted the guilty plea agreement had his counsel's performance been different let alone that the outcome of the proceedings would have been more favorable to him." (Rutti v. State, App. A *infra* at ¶ ¶ 28, 31).

To his original Motion for Partial Remand Petitioner attached two exhibits. Exhibit A was Mr. Rutti's own handwritten affidavit in support of his Motion to Withdraw his guilty plea in which he avers that "is plea in court was a result of coercion and pressure from my current attorney…I was compelled to make such a plea. I felt I was held hostage by an attorney who refused to do the normal duties

afforded to his client....Before the plea hearing I expressed my wishes to go to trial and not to plead guilty...in the light of this situation and the statements made by Dion Custis, I believe the inference of prejudice and a possible personal agenda can be deduced and should render my plea involuntary."

Exhibit B to Appellant's original Motion was Petitioner's testimony at the hearing to withdraw his guilty plea in which he discussed his desire to go to trial which was expressed to counsel. Listed in Petitioner's Renewal Motion for Partial Remand are several specific allegations constituting ineffective assistance of counsel. Renewal Motion at 5. Also attached to Appellant's Second Motion for Partial Remand is Appellant's affidavit wherein Appellant avers that he would not have accepted the plea deal except for counsel's errors and deficient performance. (App. F Affidavit ¶ 11-16).

In addition, as discussed at some length in the oral argument before the Wyoming Supreme Court held May 4, 2004, Petitioner demonstrated that had his attorney held the requisite knowledge of applicable law or even had investigated the requisite law and had challenged the constitutionality of the provisions of Wyo. Stat. § 6-4-303(a) identical to those of the federal act at issue in Ashcroft, the State would have had to prove that the photo used to convict Petitioner pursuant to Wyo. Stat. § 6-4-303(b)(iii) was of an actual minor child—rather than as someone who *appeared to be* a minor child. See also Motion for Partial Remand ¶¶ 6-7; Renewal Motion for Partial Remand Exhibit E ¶ 6. Appellant's Opening Brief at 7, Appellant's Reply Brief at 10-13.

Ultimately, the Wyoming Supreme Court's determination that: Whatever the actual conduct of Rutti's defense counsels may have been, Rutti suffered ***no*** prejudice and actually benefited from a very advantageous plea agreement is not supported by the record in this case—a record which Petitioner was denied the right to create as required by law. Instead, the lower court's decision is based upon a misstatement and misholding of the law regarding a demonstration of prejudice under this Court's Sixth Amendment precedent, and is a misapplication of such law to Petitioner's claims.

Accordingly, the Wyoming Supreme Court committed a fundamental error in reaching its result on Petitioner's Sixth Amendment claims and unfortunately, thus erred in refusing to review its Calene evidentiary record supplementation procedure to ensure that its application comports with the Sixth Amendment and Due Process. However, the most troubling aspect of the Wyoming Supreme Court's determination in this case is that it simply seems to display the general practice and policy of the court in response to a motion which would allow a criminal appellant to ***effectively*** establish and challenge trial counsel's constitutionally deficient performance.

Unfortunately, Petitioner would respectfully submit that Wyoming's highest court has failed in its supervisory role to establish and maintain a remand procedure for Sixth Amendment claims in which the standards are plainly announced and consistently and properly applied.[8] Instead, appellants and the criminal bar of this state are frequently left ignorant of the Court's reasoning in individual cases and without specific discussions of the Court's application of the evidentiary standard established in Calene. [9]

The Court's failure to maintain a procedural system which in reality effectuates a criminal defendant's right to effective assistance of both trial ***and*** appellate counsel is a violation of an appellant's right to due process and his/her Sixth Amendment right to effective assistance of counsel. Moreover, as a consequence of the Court's failure to maintain such an adequate system, the impetus behind Calene, to ensure state ineffectiveness claims are handled within the

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[8] In Brock v. State, 981 P.2d 465, 469 (Wyo. 1999), this Court announced a rule of application of the Calene procedure which does not seem to be consistently applied. "If a defendant claims ineffective assistance of counsel in a post-conviction proceeding, ***we require*** the trial court to hold an evidentiary hearing. Calene v. State, 846 P.2d 679, 683 (Wyo.1993); *Smizer v. State*, 835 P.2d 334, 337 (Wyo.1992)."

[9] Based upon Petitioner's research, by 2004 the Wyoming Court had cited or mentioned the Calene decision in 18 published opinions since its issuance in 1993. Of those opinions the Court indicated that it had granted a requested motion for partial remand on only 3 occasions. Robinson v. State, 64 P.3d 743 (Wyo. 2003); Gleason v. State, 57 P.3d 332 (Wyo. 2002); Asch v. State, 62 P.3d 945 (Wyo. 2002). See also, Barker v. State, No. 03-85 Order Granting Motion for Limited Remand, October 7, 2003.

state judicial system, has been vitiated. This Court has long held that if a state's procedural rule frustrates the exercise of a federal right, that rule is "inadequate" to preclude federal courts from reviewing the merits of the federal claim. Staub v. City of Baxley, 355 U.S. 313, 325 (1958).

In particular, Petitioner has been denied such a right personally by the Court's decision not to allow him even the opportunity to effectively present his claim. Sadly, the Court appears to have abandoned the constitutional foundation and promise of the Calene decision throughout the subsequent decade by its routine denial of use of the remand procedure by the state's criminal appellants. In Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986), this Court set forth the reasons why ineffective assistance of counsel claims must be treated differently from other *habeas* claims in considering procedural bar questions:

> Because collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation. A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance; consequently a criminal defendant will rarely know that he has not be represented competently until after trial or appeal, usually when he consults another lawyer about his case. Indeed, an accused will often not realize he has a meritorious ineffectiveness claim until he begins collateral review proceedings, particularly if he retained trial counsel on direct appeal...
>
> Id. at 378 (citation omitted).

As an initial matter, Wyoming law "applies a procedural default, waiver of constitutional right perspective to ineffectiveness of trial counsel claim in all cases if not presented by the initial

appeal." Calene, 846 P.2d at 683 (citations omitted).[10] In other words, ineffective assistance of trial counsel must be raised on direct appeal or not at all. The Wyoming Supreme Court recognized that this procedural default created evidentiary problems which it "must resolve in order to avoid adjudication from ignorance where some ineffectiveness claims cannot be resolved without supplementation of evidence which was not developed by inclusion in the initial trial record." Id. The general process to obtain the omitted information would be through a motion of partial remand for a factual hearing. Id. at 684. In fact this Court recognized that under federal post-conviction rules, "in the absence of the right of the defendant to obtain a hearing, preclusive procedural default cannot exist under the federal constitution." Id. Based on the information this Court had in Calene, it decided "[w]ithout some factual development regarding defense counsel's trial preparation, pretrial investigation, witness interview and evidentiary presentation, this court is called to adjudicate from abject ignorance - which we decline to do." Id.

Thus, in a case such as Petitioner's, where contentions of ineffectiveness are developed by appellate counsel based on matters outside the record, "a motion for remand should be made and appropriately supported by contentions defining and supporting any ineffectiveness claim in detail and supported, as may be appropriate, by affidavit sufficient to establish substantiality." *Id.* at 692. This Court decided that the test to determine whether a hearing was required was simply ***whether there was a substantial issue presented as to an ineffectiveness of counsel claim, "far different than" the more strict requirement for affirmative relief as stated under Strickland.*** *Id.* at 693 (emphasis added). See Hornecker v. State, 977 P.2d 1289 (Wyo. 1999)

In regards to the instant case, the Wyoming Supreme Court decided to do what it condemned in Calene - adjudicate from ignorance. The Wyoming Supreme Court could not properly decide Petitioner's claims based on the appellate record as it stood without

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[10] This automatic default is in marked contrast to the federal system wherein a preference is expressed that ineffective assistance claims be presented for the first time in collateral proceedings when the defendant is represented by new counsel, rather than on direct appeal when the defendant is often represented by trial counsel. Kimmelman v. Morrison, 477 U.S. 365, 378 (1986).

an evidentiary hearing, because there was no direct evidence in the record in regards to counsels' preparation and investigation. Given the fact that the standard to merit a hearing was stated as merely showing a substantial issue as to ineffective assistance, the evidence given with Petitioner's motions met that requirement. However, the decision of the Court as it now stands imposes a much heavier burden on criminal defendants. It appears from this case and others that rather than apply the announced *Calene* standard, the Court applies a standard similar to one for injunctive relief *i.e.* unless an appellant shows likelihood of success on the merits of his Sixth Amendment claim, his request for an evidentiary hearing to make the necessary record to support his claim is denied. Surely this Court can recognize the unfair tautology inherent in such an application of law.

Petitioner's case involves all of the concerns discussed by this Court in its First Amendment and Sixth Amendment cases. As the decision below stands, it is in direct conflict with this Court's constitutional reasoning. As such, it is unconscionable and cannot be reconciled with this Court's reasoning. Certiorari should be granted and Petitioner should be afforded relief. In view of the conflict of the decision below with this Court's jurisprudence the Court may wish to consider summary reversal on the merits and issue a *per curiam* opinion.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the Petition for a Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED this 14th day of March, 2005.

Lori L. Brand
Gay Woodhouse Law Office, P.C.
211 W. 19th St., Ste. 308
Cheyenne, WY 82001
(307) 432-9399
Counsel of Record
Counsel for Petitioner

APPENDIX A

Rutti v. State, 2004 WY 133, 100 P.3d 394 (Wyo. 2004)

100 P.3d 394
100 P.3d 394, 2004 WY 133 (Cite as: 100 P.3d 394)

Supreme Court of Wyoming.
James P. RUTTI, JR., Appellant (Defendant),
v.
The STATE of Wyoming, Appellee (Plaintiff).
No. 03-24.

Nov. 8, 2004.
Petition for Rehearing Denied December 14, 2004.

Background: Defendant filed pro se motion to' withdraw his guilty pleas for third degree sexual assault and sexual exploitation of a child, which were entered pursuant to plea agreement. The District Court, Laramie County, E. James Burke, 1., denied motion. Defendant appealed.

Holdings: The Supreme Court, Golden, J., held that:
(I) statute governing sexual exploitation of children was not facially overbroad;
(2) defendant was not denied effective assistance of counsel; and
(3) state did not breach plea agreement by requesting trial court dismiss relevant charges without prejudice.
Affirmed.

West Headnotes

[1] Constitutional Law 82(10) 92k82(i0) Most Cited Cases

[1] Infants 12(8) 211k12(8) Most Cited Cases

[1] Statutes 64(6) 361k64(6) Most Cited Cases
Statute governing sexual exploitation of children was not facially overbroad, and thus, did not violate the First Amendment; since one of the definitions of child pornography included in statute required use of a real child, statute could be enforced even if all other definitional sections were severed from statute. U.S.C.A. Const.Amend. 1; Wyo.Stat.Ann. § 6-4-303.

[2] Criminal Law 1030(2) 110k1030(2) Most Cited Cases
Generally, an assertion of a constitutional ground of error will not avoid application of the plain error doctrine.

[3] Criminal Law 1139 110kl139 Most Cited Cases
The Supreme Court reviews issues of law de novo.

[4] Criminal Law 273.4(1) 110k273.4(1) Most Cited Cases
A criminal defendant who pleads guilty waives any antecedent non-jurisdictional defects in his conviction.

[5] Criminal Law 273.3 110k273.3 Most Cited Cases

[5] Criminal Law 273.4(1)110k273.4(l) Most Cited Cases
A criminal defendant, by pleading guilty, admits all of essential elements of crime charged and thus waives all nonjurisdictional defenses.

[6] Constitutional Law 48(4.1) 92k48(4.1) Most Cited Cases
When analyzing an overbreadth challenge under the First Amendment, general rule is that one who alleges unconstitutionality bears a heavy burden and must clearly and exactly show unconstitutionality beyond any reasonable doubt; however, where citizen's fundamental constitutional rights such as free speech are involved, strong presumptions in favor of constitutionality are inverted, burden is on governmental entity to justify validity of ordinance, and the Supreme Court has duty to declare legislative enactments invalid if they transgress constitutional provision. U.S.c.A. Const.Amend. 1.

[7] Constitutional Law 90(3) 92k90(3) Most Cited Cases
The overbreadth doctrine prohibits government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 90(1) 92k90(1) Most Cited Cases
A statute is unconstitutional on its face if it prohibits a substantial amount of protected expression. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 82(4) 92k82(4) Most Cited Cases
If a statute is facially overbroad in violation of the First Amendment it cannot be enforced in any part. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 82(4) 92k82(4) Most Cited Cases

[10] Constitutional Law 90(3) 92k90(3) Most Cited Cases
First Amendment doctrine of overbreadth is an exception to normal rule regarding standards for facial challenges; showing that a law punishes a "substantial" amount of protected free speech, judged in relation to the statute's plainly legitimate sweep, suffices to invalidate all enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. U.S.C.A. Const.Amend. 1.

[11] Criminal Law 1130(5)110k 1130(5) Most Cited Cases
Supreme Court would not consider on appeal constitutionality of any specific portion of statute governing sexual exploitation of children, where defendant had argued only that statute was facially overbroad, and presented no argument as to constitutionality of any specific portion of statute. U.S.C.A. Const.Amend. 1; Wyo.Stat.Ann. § 6-4-303

[12] Constitutional Law 48(4.1) 92k48(4.l) Most Cited Cases
Striking down an entire statute as overbroad is a drastic remedy and is not favored. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law 48(4.1) 92k48(4.1) Most Cited Cases
When a federal court is dealing with a federal statute challenged as overbroad, it should construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction. U.S.C.A. Const.Amend. 1.

[14] Statutes 64(1) 36lk64(1) Most Cited Cases
If a federal statute is not subject to a narrowing construction and is impermissibly overbroad, it nevertheless should not be stricken down on its face; if it is severable, only the unconstitutional portion is to be invalidated. U.S.C.A. Const.Amend. 1.

[15] Statutes 64(1) 36lk64(1) Most Cited Cases
Whether or not provisions of a statute are severable is a matter of state law.

[16] Criminal Law 1130(5) 110k 1130(5) Most Cited Cases
Supreme Court would not consider on appeal defendant's argument that statute governing sexual exploitation of children was void for vagueness as applied to him; defendant's only assertion supporting argument was that if statute was not facially unconstitutional, then information charging him with sexual exploitation of a child by delivering child pornography was insufficient because it did not specify under which definition of child pornography defendant was being charged, and defendant cited no case authority supporting his position that alleged vagueness in information rendered statute unconstitutional as applied. Wyo.Stat.Ann. § 6-4-303.

[17] Criminal Law 641.13(5) 110k641.13(5) Most Cited Cases
Defendant, who pled guilty pursuant to plea agreement to third degree sexual assault and sexual exploitation of a child, was not denied effective assistance of counsel; defendant admitted he committed the two acts of third degree sexual assault, victim corroborated defendant's admission, defendant made no argument that outcome of trial would have produced more advantageous result than plea agreement, and result of plea agreement was extremely advantageous to defendant since package deal was negotiated in which state agreed to drop two counts and stood silent at sentencing in return for defendant's guilty plea. U.S.C.A. Const.Amend. 6; Wyo.Stat.Ann. § 6-4-303.

[18] Criminal Law 273.3 110k273.3 Most Cited Cases
A counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes issue of factual guilt from case.

[19] Sentencing and Punishment 350Hk4 Most Cited Cases
In most cases, factual guilt is a sufficient basis for state's imposition of punishment.

[20] Criminal Law 273.4(1)110k273.4(1) Most Cited Cases

A guilty plea simply renders irrelevant those constitutional violations not logically inconsistent with valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established.

[21] Criminal Law 1026.10(4)110k1026.10(4) Most Cited Cases
Where a defendant has entered a guilty plea, he may challenge his subsequent conviction on appeal only with respect to matters which affect the voluntariness of his plea or the subject-matter jurisdiction of a trial court.

[22] Criminal Law 273.1(3) 110k273.1(3) Most Cited Cases
When a guilty plea has been entered upon the advice of counsel, the voluntariness of that plea may depend on the extent to which that advice comports with the constitutional guarantee to the effective assistance of counsel. U.S.C.A. Const.Amend. 6.

[23] Criminal Law 273(1)11Ok273(1} Most Cited Cases
A prospect of plea bargaining, the expectation or hope of a lesser sentence, or the convincing nature of the evidence against the accused are considerations that might well suggest the advisability of a guilty plea without elaborate consideration of whether pleas in abatement, such as unconstitutional grand jury selection procedures, might be factually supported.

[24] Criminal Law 641.13(5) 110k641.13(5) Most Cited Cases
When an attorney has allegedly misadvised his client with respect to the entry of a guilty plea, a

determination must be made of whether the decision to plead and forego the defense of his case resulted in prejudice to the client; that determination involves question of whether recommendation of reasonably competent attorney concerning plea would differ from that given and whether, absent the error, outcome of trial would have been more advantageous to client than result of plea. U.S.C.A. Const.Amend.6.

[25] Criminal Law 641.13(5) 110k641.13(5) Most Cited Cases
In order to satisfy the "prejudice" requirement for evaluating claims of ineffective assistance of counsel under Strickland, defendant must

show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. U.S.C.A. Const.Amend. 6.

[26] Criminal Law 1181.5(6)11Okl181.5(6) Most Cited Cases
Defendant, who pled guilty pursuant to plea agreement to third degree sexual assault and sexual exploitation of a child, failed to present serious and specific allegations supporting Strickland test for ineffectiveness on appeal, and thus, there was no support for a remand; in his affidavit submitted on appeal in support of his motion for partial remand, defendant did not make claim that he would not have accepted plea agreement had his counsel's performance been different, or that ultimate outcome of proceedings would have been more favorable to him, and although defendant suggested errors, he made no allegation of specific prejudice in his affidavit. U.S.C.A. Const.Amend. 6.

[27] Criminal Law 641.13(1) 110k641.13(1) Most Cited Cases
An evidentiary hearing is only required when serious and specific allegations of legal ineffectiveness are sufficiently stated and documented to show a real and substantial issue. U.S.C.A. Const.Amend. 6.

[28] Criminal Law 700(1) 110k700(1) Most Cited Cases
Prosecutor's misrepresentation of facts at hearing on defendant's motion to withdraw guilty plea did not violate clear and unequivocal rule of law in prosecution for third degree sexual assault and

sexual exploitation of a child; rule of law defendant claimed was violated was standard stating that prosecutor should never knowingly misrepresent evidence to court, record did not reflect that prosecutor made factually incorrect remarks knowingly, and it could have been a simple mistake with regards to actual facts of defendant's conduct. Wyo.Stat.Ann. § 6-4-303.

[29] Criminal Law 1030(1) ll0k1030(1) Most Cited Cases
Plain error exists when: (1) record is clear about
Incident alleged as error; (2) there was

transgression of clear and unequivocal rule of law; and (3) party claiming error was denied substantial right which materially prejudiced him. Rules Crim.Proc., Rule 52(b).

[30] Criminal Law 1030(1) llOkl030(1) Most Cited Cases

[30] Criminal Law 1141(2) 110k1141(2) Most Cited Cases
Burden of proving plain error rests with criminal defendant; it is defendant rather than government who bears burden of persuasion with respect to prejudice, and in most cases, a court of appeals cannot correct forfeited error unless defendant shows that error was prejudicial. Rules Crim.Proc., Rule 52(b).

[31] Criminal Law 1030(1) llOk1030(1) Most Cited Cases
The Supreme Court's review for plain error is discretionary. Rules Crim.Proc., Rule 52(b).

[32] Criminal Law 1030(1) llOkl030(1) Most Cited Cases
In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.

[33] Criminal Law 1032(5) llOkl032(5) Most Cited Cases
Prosecutor's mistake in charging defendant with solicitation of a minor with regard to defendant's contact with Division of Criminal Investigation (DCI) agent did not amount to plain error; although agent posing as 15-year-old was not minor, defendant allegedly believed he was chatting with a minor and could be prosecuted for attempted solicitation of a minor, defendant admitted to soliciting victim, who was 15-year-old, during course of their internet chat, and thus, although prosecutor may have been mistaken in charging defendant with solicitation with regard to defendant's contact with agent, there was no prejudice to defendant since his conduct supported attempt charge as well as solicitation charge with regard to victim. Wyo.Stat.Ann. §§ 6-1-301, 143-104.

[34] Criminal Law 273.1(2) 11Ok273.1(2) Most Cited Cases

State did not breach plea agreement by requesting trial court dismiss relevant charges without prejudice, in prosecution for third degree sexual assault and sexual exploitation of a child; although defendant argued that plea agreement required counts to be dismissed with prejudice, all record reflected was that state agreed to dismiss two counts in exchange for guilty plea and record was silent on whether dismissals were to be with or without prejudice, state did dismiss two relevant counts, and defendant had not shown that state had breached any material term of plea agreement. Wyo.Stat.Ann. § 6-4-303.

[35] Criminal Law 273.1(2) 110k273.1(2) Most Cited Cases

[35] Criminal Law 1139 110k1139 Most Cited Cases
When a plea of guilty rests to any significant degree on a promise or agreement by state, that promise must be fulfilled; whether the prosecutor has violated the plea agreement is a question that is reviewed de novo.

[36] Criminal Law 273.1(2) 110k273.1(2) Most Cited Cases
When determining whether a breach of the plea agreement has occurred the Supreme Court: (I) examines the nature of the promise, and (2) evaluates the promise in light of defendant's reasonable understanding of the promise at the time the plea was entered.

*398 Representing Appellant: Lori L. Brand of Gay Woodhouse Law Office, Cheyenne, Wyoming.

Representing Appellee: Patrick J. Crank, Attorney General; Paul Rehurek, Deputy Attorney General; D. Michael Pauling, Senior Assistant Attorney General; Georgia L. Tibbets, Senior Assistant Attorney General; Theodore E. Lauer, Director, and Shannon Sheets, Student Intern, of the Prosecution Assistance Program. Argument by Ms. Sheets.

Before HILL, C.J., and GOLDEN, LEHMAN, KITE, and VOIGT, JJ.

GOLDEN, Justice.

[¶ 1] James Rutti appeals a Judgment and Sentence that resulted from Rutti's entry of two guilty pleas pursuant to a plea agreement. After Rutti entered his guilty pleas he filed a pro se motion to withdraw them. After a hearing at which Rutti was represented by counsel, the trial court denied Rutti's motion to withdraw his guilty pleas. On appeal, Rutti makes multiple claims of error. First, Rutti was charged with sexual exploitation of a child under Wyo. Stat. Ann. §6-4-303(b)(iii)(LexisNexis 2003) [FN1] for delivering child pornography. Rutti argues that § 6-4-303(b)(iii) is facially overbroad and thus violates the First Amendment to the United States Constitution. Next, Rutti claims he received legally ineffective assistance of counsel and at the least this Court should remand the case to the trial court for a hearing to develop the record regarding his ineffectiveness claim. Rutti also claims the prosecutor engaged in misconduct and breached the plea agreement. This Court *399 fmds that no remand for an evidentiary hearing is appropriate under the circumstances. Finding no prejudicial error, we affirm.

FN1. § 6-4-303. Sexual exploitation of children; penalties; definitions.
(a) As used in this section:
(i) "Child" means a person under the age of eighteen (18) years;
(ii) "Child pornography" means any visual depiction, including any photograph, film, video, picture, computer or computer-generated image or picture, whether or not made or produced by electronic, mechanical or other means, of explicit sexual conduct, where:
(A) The production of the visual depiction involves the use of a child engaging in explicit sexual conduct;
(B) The visual depiction is, or appears to be, of a child engaging in explicit sexual conduct;
(C) The visual depiction has been created, adapted or modified to appear that a child is engaging in explicit sexual conduct; or (D) The visual depiction is advertised, promoted, described or distributed in a manner that conveys the impression that the material is, or contains, a visual depiction of a child engaging in explicit sexual conduct.
(iii) "Explicit sexual conduct" means actual or simulated sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, between persons of the same or opposite sex, bestiality, masturbation, sadistic or masochistic abuse or lascivious exhibition of the genitals or pubic area of any person;

(iv) "Visual depiction" means developed and undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image.
(b) A person is guilty of sexual exploitation of a child if, for any purpose, he knowingly:
(i) Causes, induces, entices, coerces or permits a child to engage in, or be used for, the making of child pornography;
(ii) Causes, induces, entices or coerces a child to engage in, or be used for, any explicit sexual conduct;
(iii) Manufactures, generates, creates, receives, distributes, reproduces, delivers or possesses with the intent to deliver, including through digital or electronic means, whether or not by computer, any child pornography;
(iv) Possesses child pornography,....

ISSUES

[¶ 2] Rutti states the issues as:
I. Whether Appellant's conviction for violation of Wyo. Stat. § 6-4-303(b)(iii) must be vacated because it is unconstitutional as violative of the First Amendment to the U.S. Constitution.
II. Whether Appellant's Sixth Amendment right to effective assistance of trial counsel was violated by trial counsel's deficient performance in defense of Appellant.
A. Whether counsel Dion Custis appropriately advised Appellant to plead guilty to a charge previously found violative of the U.S. Constitution.
B. Whether counsel Dion Custis appropriately advised Appellant to plead guilty in exchange for dismissal of a charge which Appellant had not committed as a matter of law.
C. Whether counsel Marion Yoder appropriately advised Appellant and the trial court in regard to Appellant's motion to withdraw guilty plea prior to sentencing.
III. Whether the district attorney committed prosecutorial misconduct by failing to bring jurisdictional issues to the attention of the trial court and by misrepresenting the facts to the trial court when arguing against Appellant's motion to withdraw guilty plea prior to sentencing.
IV. Whether the State breached the plea agreement with defendant by failing to dismiss two counts against him with prejudice.

V. Whether the Wyoming Supreme Court's Calene hearing procedure, established to provide evidentiary record supplementation for ineffective assistance of counsel claims, and its application by the Wyoming Supreme Court adequately protects Appellant's constitutional right to due process and/or his Sixth Amendment right to effective assistance of counsel.

The State essentially agrees with the issues as presented by Rutti.

FACTS [FN2]

FN2. Rutti includes facts from an affidavit attached to appellate documents and from a cassette recording of his preliminary hearing. Neither of these sources are part of the record on appeal. This Court has disregarded any facts proposed by Rutti that are not reflected in the official record on appeal.

[¶ 3] A Division of Criminal Investigation (DCI) agent, posing as a fifteen year-old girl, "Candy," made contact with James Rutti in a chat room on the Internet. During the course of their chat room exchange, Rutti forwarded a photograph of a preteen girl in a sexually explicit situation to the undercover agent. [FN3] Allegedly, Rutti also suggested to "Candy" that they meet and engage in sexual activity. Rutti was arrested at his home in Laramie. During questioning, Rutti admitted to previously having sexual contact with another fifteen year-old girl who we will refer to as MA. Rutti met MA in the chat room and then arranged to meet her in person in Cheyenne where sexual contact occurred. .

FN3. During his change of plea hearing the State offered this statement regarding the photograph as the factual basis to support Rutti's guilty plea under § 6-4-303(b)(iii). Rutti, through his defense counsel, accepted that the State could prove the facts as alleged in this statement.

[¶ 4] An Information was filed in Laramie County against Rutti containing four counts. Count I charged Rutti with sexual exploitation of a child by delivering child pornography pursuant to § 6-4-303(b)(iii). Count II charged Rutti with soliciting a minor pursuant to Wyo. Stat. Ann. § 14-3- 104 (LexisNexis 2003) [FN4] for his chat room contact with the DCI agent. Counts III and IV

charged Rutti with third-degree sexual assault for *400 separate acts occurring during his sexual encounter with MA. [FN 5]

FN4. § 14-3-104. Soliciting to engage in illicit sexual relations; penalty.
Except under circumstance constituting sexual assault in the first, second or third degree as defined by W.S. 6-2-302 through 6-2-304, anyone who solicits, procures or knowingly encourages anyone under the age of sixteen (16) years to engage in illicit sexual penetration or sexual intrusion as defined in W.S. 6-2-301 is guilty of a felony, and upon conviction shall be imprisoned for a term not more than five (5) years.

FN5. § 6-2-304. Sexual assault in the third degree.
(a) An actor commits sexual assault in the third degree if, under circumstances not constituting sexual assault in the first or second degree:
(i) The actor is at least four (4) years older than the victim and inflicts sexual intrusion on a victim under the age of sixteen (16) years[.]

[¶5] Rutti was represented by the Public Defender's Office. Eventually, Rutti accepted a plea bargain whereby he would plead guilty to one count of third degree sexual assault and one count of sexual exploitation of a child by delivering child pornography in exchange for the State dismissing the other two counts and standing silent at sentencing. At a change of plea hearing, after satisfying the trial court that his pleas were knowing and voluntary, Rutti entered his two guilty pleas. Both Rutti and the State supplied the factual bases for Rutti's respective guilty pleas at the change of plea hearing. Soon after the hearing and the acceptance by the trial court of Rutti's two guilty pleas, the State dismissed the other two counts without prejudice.

[¶ 6] Almost five months after the change of plea hearing, but prior to sentencing, Rutti filed a pro se motion to withdraw his guilty pleas. In the motion, Rutti alleged he was coerced by his defense counsel to enter the guilty pleas. Rutti alleged that he always had wanted to go to trial. His defense counsel, however, prior to Rutti's acceptance of the plea bargain, was unfamiliar with the facts and the

law of the case and informed Rutti that he would not put on any sort of defense. Because of the attitude of defense counsel, Rutti alleged he felt compelled to accept the plea bargain. Rutti also alleged in his motion that he had a defense that he wanted to present, although Rutti did not specify the nature of that defense.

[¶ 7] Rutti's motion to withdraw his guilty pleas was heard by the trial court. Rutti was represented by different defense counsel at the hearing. Rutti was the only person to testify at the hearing. Rutti testified that, within a couple of days after he entered the pleas, he told his prior defense attorney that he wanted to withdraw his guilty pleas and go to trial but his attorney refused to file a motion to withdraw the pleas. In response to questioning by the State, Rutti testified that he wasn't threatened in any way to accept the plea bargain but did so because "[t]here was no other choice, apparently." The trial court denied the motion. Generally, Rutti was sentenced to a term of three to five years, suspended, on the count of sexual exploitation of a child by delivering child pornography and a term of four to seven years on the count of third degree sexual assault.

[¶ 8] After filing this appeal, Rutti filed two motions with this Court requesting this Court remand this case to the trial court for an evidentiary hearing limited to the issue of whether two of Rutti's defense counsels provided legally effective representation. This Court denied both motions.

DISCUSSION

Constitutionality of § 6-4-303(b)(iii)

[1][2][3] [¶ 9] Rutti's challenge to the facial validity of § 6-4-303(b)(iii) as overbroad and violative of the First Amendment presents an issue of law. This Court reviews issues of law de novo. *Anderson v. Bommer*, 926 P.2d 959, 961 (Wyo.1996). [FN6]

FN6. Because the constitutionality of the statute was not raised below, the parties argue in their respective briefs over whether this Court should apply a plain error standard of review to this

constitutional question. Generally, "[t]he assertion of a constitutional ground of error will not avoid the application of" the plain error doctrine. *Hampton v. State*, 558 P.2d 504, 508 (Wyo. 1977). Under the circumstances of this appeal, however, no error analysis is necessary since if this Court determines that § 6-4-303 is facially overbroad and therefore violative of the First Amendment the result is that the statute becomes unenforceable.

[4][5] [¶ 10] Rutti claims that § 6-4-303 is overbroad and therefore facially unconstitutional under the First Amendment of the United States Constitution. As an initial observation, we must emphasize that a criminal defendant who pleads guilty waives any antecedent non-jurisdictional defects in his conviction. "A criminal defendant, by pleading guilty, admits all of the essential elements *401 of the crime charged and thus waives all nonjurisdictional defenses." *Ochoa v. State*, 848 P.2d 1359, 1361 (Wyo.1993). While this leaves only narrowly proscribed issues open to appeal, this Court has previously accepted that challenging the constitutionality of the statute under which the criminal defendant was charged does qualify as a jurisdictional defense. *Armijo v. State*, 678 P.2d 864, 867 (Wyo.1984) ("[a] criminal defendant does not, however, waive the right to challenge the constitutionality of the statute defining the crime to which he enters a plea of guilty by virtue of his plea").

[6][7][8][9][10] [¶ 11] When analyzing an overbreadth challenge under the First Amendment:

> The general rule is that one who alleges unconstitutionality bears a heavy burden and must clearly and exactly show the unconstitutionality beyond any reasonable doubt. *Pauling v. Pauling*, 837 P.2d 1073, 1076 (Wyo.1992). However, that rule does not apply where a citizen's fundamental constitutional right, such as free speech, is involved. The strong presumptions in favor of constitutionality are inverted, the burden then is on the governmental entity to justify the validity of the ordinance, and this Court has a duty to declare legislative enactments invalid if they transgress that constitutional provision.

Miller v. City of Laramie, 880 P.2d 594, 597 (Wyo. 1994). "The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Ashcroft v. Free Speech*

Coalition, 535 U.S. 234, 255, 122 S.Ct. 1389, 1404, 152 L.Ed.2d 403 (2002). A statute is unconstitutional on its face if it prohibits a substantial amount of protected expression. Id. at 244, 122 S.Ct. at 1398-99. If a statute is facially overbroad in violation of the First Amendment it cannot be enforced in any part. Because of the severity of the remedy, success of a First Amendment challenge to the facial overbreadth of a statute depends upon a finding that the statute's application to protected speech is substantial:

The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges. See *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). The showing that a law punishes a "substantial" amount of protected free speech, "judged in relation to the statute's plainly legitimate sweep," *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), suffices to invalidate all enforcement of that law, "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression," id., at 613, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830. See also *Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003); *New York v. Ferber*, 458 U.S. 747, 769, n. 24, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982); *Dombrowski v. Pfister*, 380 U.S. 479, 491, and n. 7, 497, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965).

We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech--especially when the overbroad statute imposes criminal sanctions. See *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, *Dombrowski, supra*, at 486-487, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22--harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas. Overbreadth adjudication, by suspending all enforcement of an

overinclusive law, reduces these social costs caused by the withholding of protected speech.
As we noted in *Broadrick*, however, there comes a point at which the chilling effect of an overbroad law, significant *402 though it may be, cannot justify prohibiting all enforcement of that law--particularly a law that reflects "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." 413 U.S. at 615, 93 S.Ct. 2908, 37 L.Ed.2d 830. For there are substantial social costs created by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, ibid., before applying the "strong medicine" of overbreadth invalidation, id., at 613, 413 U.S. 601, 93 S.Ct. 2908,37 L.Ed.2d 830.
Virginia v. Hicks, 539 U.S. 113, 118-120, 123 S.Ct. 2191, 2196-97,156 L.Ed.2d 148 (2003).

[¶ 12] Rutti's sole argument is that § 6-4-303 is unconstitutionally overbroad due to the application of the decision by the United States Supreme Court in *Ashcroft v. Free Speech Coalition*. In *Free Speech Coalition*, the Supreme Court struck down two defmitional terms of child pornography, sections 18 U.S.C. § 2256(8)(B) & (D), as overbroad and in violation of the First Amendment. 535 U.S. at 256, 258, 122 S.Ct. at 1405, 1406. Essentially, the Supreme Court ruled that child pornography can only be regulated if it meets the defmition of obscenity under *Miller v. California*, 413 U.S. 15,93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), or involves the use of an actual child as explained in *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). The definitional sections struck down by the Supreme Court in Free Speech Coalition criminalized child pornography created through the use of "virtual" children, i.e., images of children generated through technology that do not depict an actual child.

[11] [¶13] Rutti argues that the definitional provisions found unconstitutional by the United States Supreme Court in Free Speech

Coalition are nearly identical to the corresponding definitional provisions in Wyoming's statute and therefore Wyoming's statute should be struck down as overbroad. Rutti presents no argument specifically challenging the corresponding two definitional provisions in the Wyoming statute. Rutti only argues that the entire statute is facially overbroad. Thus, this appeal presents this Court with no occasion to determine if any particular provision of § 6-4-303 is unconstitutionally overbroad. Since "[c]ourts will not pass upon constitutional questions unless necessary," *Fristam v. City of Sheridan*, 66 Wyo. 143, 150,206 P.2d 741, 743 (Wyo.1949), our only concern in this appeal is with the Wyoming statute as a whole.

[12][13][14] [¶14] Striking down an entire statute as overbroad is a drastic remedy and is not favored. *Ochoa*, 848 P.2d at 1364 ("overbreadth doctrine is 'strong medicine' which should be utilized sparingly.") Under federal law all other options should be attempted before declaring a statute void: When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction. *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932). Accord, e.g., *Haynes v, United States*, 390 U.S. 85, 92, 88 S.Ct. 722, 727, 19 L.Ed.2d 923 (1968) (dictum); *Schneider v. Smith*, 390 U.S. 17, 27, 88 S.Ct. 682, 687, 19 L.Ed.2d 799 (1968); *United States v. Rumely*, 345 U.S. 41, 45, 73 S.Ct. 543, 545, 97 L.Ed. 770 (1953); *Ashwander v. TVA*, 297 U.S. 288, 348, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) (Brandeis, 1., concurring). Furthermore, if the federal statute is not subject to a narrowing construction and is impermissibly overbroad, it nevertheless should not be stricken down on its face; if it is severable, only the unconstitutional portion is to be invalidated. United States v. Thirty-seven Photographs, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971).
A state court is also free to deal with a state statute in the same way. If the invalid reach of the law is cured, there is no longer reason for proscribing the statute's application to unprotected conduct.
*403 *Ferber,* 458 U.S. at 769 n. 24, 102 S.Ct. at 3361 n. 24. Indeed, the United States Supreme Court did not strike down the entire federal statute at issue in Free Speech Coalition as facially overbroad. It only ruled on the two definitional sections that were the subject of the appeal in Free Speech Coalition. In fact, the federal

statute at issue in Free Speech Coalition is not facially invalid because it expressly is subject to a savings clause:

> Congress explicitly wrote a severability provision that states that "if any provision of this Act, including the definition of the child pornography... is held to be unconstitutional, the remainder of this Act, including any other provision or section of the definition of the term child pornography, ... shall not be affected thereby." CPPA, Pub.L. No. 104-208, § 8, 110 Stat. 3009, 3009-31 (1996). Therefore, the unconstitutionality of §§ 2256(8)(B), (D), does not preclude conviction under other provisions of the CPP A.

Jones v. United States, 2004 WL 1013315, *9 n. 5, 2004 U.S. Dist. LEXIS 7997, *26 n. 5 (N.D.N.Y.2004); see also *United States v. Kelly*, 314 F.3d 908, 912 (7th Cir.2003) (the federal statute "has a savings clause evidencing Congress' intent to make the statute severable").

[15] [¶ 15] Thus, contrary to Rutti's argument, the mere application of the Free Speech Coalition decision does not render § 6-4-303 void as facially overbroad under the First Amendment. Rather, an independent analysis is required as to whether any sections of § 6-4-303 that might be unconstitutional can be severed from the statute. Whether or not provisions of a statute are severable is a matter of state law. *Local 514 Transp. Workers Union of Am. v. Keating*, 2003 OK 110, ¶13, 83 P.3d 835, ¶ 13 (Okla.2003); *see also Fraternal Order of Police v. Stenehjem*, 287 F.Supp.2d 1023, 1030-31 (D.N.D.2003) (whether invalid portions of a state statute which is otherwise found constitutional are severable is a matter of state law). Rutti presents no argument regarding the severability of provisions of the Wyoming statute.

[¶16] Despite the lack of argument by Rutti, we will continue the analysis and determine if, under Wyoming law, § 6-4-303 should be struck down in its entirety if certain definitional provisions were determined to be unconstitutional. Section 6-4-303 does not contain a savings clause. Generally, however, Wyo. Stat. Ann. § 8-1-103(a)(viii) (LexisNexis 2003) provides for the severability of statutory provisions that are determined to be invalid if the valid portions are sufficient in themselves to accomplish the purpose of the statute:

> § 8-1-103. Rules of construction for statutes.

(a) The construction of all statutes of this state shall be by the following rules, unless that construction is plainly contrary to the intent of the legislature:
* * * *

(viii) If any provision of any act enacted by the Wyoming legislature or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of any such act are severable.

Severability, then, is the general rule; and Rutti makes no argument that § 6-4-303 is indivisible.

[¶ 17] As this Court reasoned on another occasion:
Appellant does not suggest that the act is indivisible, and there has been no showing that it is unconstitutional as a whole. Furthermore, deletion of this section would not destroy the purposes of the act. Therefore, we find a constitutional encroachment only with respect to § 7-242.5(a), supra. See *Holm v. State,* Wyo., 404 P.2d 740, at 743-745. We further hold that the last sentence contained in § 7-242.5(a), supra, does not bear the taint which we find objectionable in the preceding portions of the section. Since this portion of the section is a necessary part of the amended procedure in mental-illness or deficiency cases, it shall be retained.
Sanchez v. State, 567 P.2d 270, 280 (Wyo.1977). The same reasoning applies to this *404 appeal. One of the definitions of child pornography included in § 6-4-303 requires the use of a real child. The statute therefore can be enforced even if all other definitional sections were severed from the statute. "[T]he several parts are [not] so interdependent that the main purpose of the law would fail by reason of the invalidity of a part." *McFarland v. City of Cheyenne*, 48 Wyo. 86, 99,42 P.2d 413, 416 (Wyo.1935). This Court determines that the provisions of § 6-4-303 that are the subject of Rutti's protests would be severable if they were found to be unconstitutional. The constitutional portions of § 6-4-303 remain valid and enforceable. Therefore, the statute generally is not facially overbroad.

[16] [¶ 18] Rutti fleetingly alleges that § 6-4-303 is unconstitutionally vague as applied to him. His only assertion supporting this argument is that if § 6-4-303 is not facially unconstitutional, then the Information charging him with sexual exploitation of a child by delivering child pornography was insufficient because it did not specify under which definition of child pornography Rutti was being charged. Rutti cites no case authority supporting his position that alleged vagueness in an Information renders a statute unconstitutional as applied. Given the lack of adequate cogent argument and the lack of any citation to pertinent authority, we decline to address Rutti's void for vagueness as applied argument.

[¶ 19] We emphasize that Rutti has argued only that § 6-4-303 is facially overbroad. He has presented no argument as to the constitutionality of any specific portion of § 6-4-303 so we do not consider the same in this appeal. Our determination that § 6-4-303 is not facially overbroad ends our discussion. We do note, however, that even the State concedes that the pertinent definitional language of the Wyoming statute is very similar to the corresponding language in the federal statute found unconstitutional by the United States Supreme Court in *Free Speech Coalition*. Although unconstitutional provisions of a statute are judicially severable if it were to become necessary, it is preferable if § 6-4-303 receives the urgent attention of the Wyoming Legislature.

Ineffective assistance of counsel

[17] [¶ 20] Rutti's next issue alleges several instances of ineffective assistance of two of his defense counsels. Rutti alleges that the record on appeal is insufficient for this Court to accurately determine whether his counsels effectively represented him and therefore this Court should remand the case to the trial court for an evidentiary hearing on the issue. The fact that this Court has already denied Rutti's motions for remand forms the basis for Rutti's fifth issue. Thus, we will also treat Rutti's fifth issue within this analysis.

[18][19][20][21][22] [¶ 21] With regard to claims of ineffective assistance of counsel occurring prior to the defendant's guilty plea, the only ineffective assistance of counsel claims that survive Rutti's

guilty pleas are claims directly related to the voluntariness of the pleas entered:

[W]here a defendant has entered a guilty plea, he may challenge his subsequent conviction on appeal only with respect to matters which affect the voluntariness of his plea or the subject-matter jurisdiction of the trial court. *Zanetti v. State,* 783 P.2d 134, 137-38 (Wyo. 1989). When a guilty plea has been entered upon the advice of counsel, the voluntariness of that plea may depend on the extent to which that advice comports with the constitutional guarantee to the effective assistance of counsel.

Lower v. State, 786 P.2d 346, 348-49 (Wyo. 1990). [FN7] See generally *Wilson v. State*, 2003 WY 59, 68 P.3d 1181 (Wyo.2003).

FN7. To the extent Rutti requested this Court remand this case for an evidentiary hearing relating to his counsels' alleged deficiencies in not pursuing a possible motion to suppress his confession or pursuing Rutti's right to a speedy trial, such issues were waived by Rutti's guilty plea.

"[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established." *Menna v. New York*, 423 U.S. 61, 63 n. 2, 96 S.Ct. 241, 242 n. 2, 46 L.Ed.2d 195 (1975). *See generally Davila v. State*, 831 P .2d 204, 206 (Wyo.1992) (examples of nonjurisdictional defects waived by a guilty plea include use of inadmissible evidence (claim of unlawful search and seizure, claim of unlawfully obtained statements); and claim of violation of the right to speedy trial).

*405 [23] [¶ 22] In order to prevail on any claim of ineffective assistance of counsel, a defendant bears the burden to establish both that counsel's performance was deficient and that the deficient performance produced actual prejudice. *Daniel v. State*, 2003 WY 132, ¶36, 78 P.3d 205, ¶ 36 (Wyo.2003); see also *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d

674 (1984). The United States Supreme Court has accepted that the performance of defense counsel can be evaluated in broad terms:
The principal value of counsel to the accused in a criminal prosecution often does not lie in counsel's ability to recite a list of possible defenses in the abstract, nor in his ability, if time permitted, to amass a large quantum of factual data and inform the defendant of it. Counsel's concern is the faithful representation of the interest of his client, and such representation frequently involves highly practical considerations as well as specialized knowledge of the law. Often the interests of the accused are not advanced by challenges that would only delay the inevitable date of prosecution, *see Brady v. United States, supra*, 397 U.S. [742] at 751-752, 90 S.Ct. [1463] at 1470-1471 [25 L.Ed.2d 747 (1970)], or by contesting all guilt, see *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). A prospect of plea bargaining, the expectation or hope of a lesser sentence, or the convincing nature of the evidence against the accused are considerations that might well suggest the advisability of a guilty plea without elaborate consideration of whether pleas in abatement, such as unconstitutional grand jury selection procedures, might be factually supported.
Tollett v. Henderson, 411 U.S. 258, 267-68, 93 S.Ct. 1602, 1608,36 L.Ed.2d 235 (1973).

[24] [¶23] To show prejudice, Rutti must demonstrate that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty, would have insisted on going to trial, and the results of the trial would have been more advantageous than the results of the plea agreement.

This Court has described the circumstances warranting allowing a criminal defendant to withdraw his guilty plea because of ineffective assistance of counsel at length:
To warrant reversal on his claim of ineffective assistance of counsel, appellant must demonstrate some deficiency in the representation received from his attorney. Counsel must have failed, in light of all circumstances existing at the time of the challenged act or omission, to employ such judgment or to render such assistance as would have been offered by a reasonably competent attorney under like circumstances. In addition, appellant must demonstrate that counsel's deficiency prejudiced the defense of his case. He must demonstrate

the existence of a reasonable probability that, absent that deficiency, the result of the proceedings would have been different. Counsel's ineffectiveness must be so serious as to undermine this court's confidence that the outcome was fair. *Laing v. State,* 746 P.2d 1247, 1248-49 (Wyo.1987); *Gist v. State*, 737 P.2d 336, 342 (Wyo. 1987); *Frias v. State*, 722 P.2d 135, 145-47 (Wyo. 1986).
When an attorney has allegedly misadvised his client with respect to the entry of a guilty plea, a determination must be made of whether the decision to plead and forego the defense of his case resulted in prejudice to the client. That determination involves two interrelated questions: whether, in the absence of counsel's error, the recommendation of a reasonably competent attorney concerning the plea would differ from that given; and whether, absent the error, the outcome of a trial would have been more advantageous to the client than the result of his plea. *Hill [v. Lockhart],* 474 U.S. [52] at 59-60, 106 S.Ct. [366] at 370-71 [1985][88 L.Ed.2d 203] . The defendant may also establish the necessary prejudice by proof of circumstances *406 indicating that, in deciding whether or not to plead guilty, he placed special emphasis on the challenged aspect of his attorney's advice. He must suggest to the reviewing court a plausible reason why, had his representation been as he claims it should have been, he would have chosen to forsake the benefits of his plea agreement for the risks of trial.
Lower, 786 P.2d at 349-50.

[¶ 24] The *Lower* court specifically held that one of the elements of prejudice is "whether, absent the error, the outcome of a trial would have been more advantageous to the client than the result of his plea." *Id.* The *Lower court* cited to *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) , in support of this contention. We recognize that this Court held in *Brock v. State*, 981 P.2d 465 (Wyo.1999) that, under certain circumstances, "the defendant is not required to demonstrate a probability that the result of the trial would be different, but instead must only demonstrate that there is a reasonable probability that he would not have entered the plea except for the presence of the errors made by counsel." *Id.* at 469. The *Brock* Court also cited to *Hill* to support its holding.

[25] [¶ 25] The Hill Court determined that a prejudice analysis was required in the context of withdrawing a guilty plea. Pursuant to *Hill*:

The second, or "prejudice," requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the *affirmative defense likely would have succeeded at trial. See*, e.g., Evans v. Meyer, 742 F.2d 371, 375 (C.A.7 1984) ("It is inconceivable to us ... that [the defendant] would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received"). As we explained in *Strickland v. Washington, supra*, these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the "idiosyncrasies of the particular decisionmaker." *Id.*, 466 U.S. at 695, 104 S.Ct. at 2068.

Hill, 474 U.S. at 59-60, 106 S.Ct. at 370-71 (footnote omitted).

Reading the entire passage, it is clear that the *Hill* Court was not lessening the prejudice requirements of *Strickland*, but rather simply suggesting ways the *Strickland* standard might apply to guilty plea situations. If a defendant refuses to plead guilty, he ultimately must face trial.

Thus, an objective showing of a reasonable probability that, but for the errors made by counsel, a defendant would not have accepted a plea bargain, ultimately rests on whether there is an objectively reasonable probability that the outcome at trial would have been more advantageous to the defendant. Thus, in reality, *Brock* requires the same analysis as *Lower*. As *Hill s*tates, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59, 106 S.Ct. at 370.

*407 [¶ 26] If we conclude that a defendant fails to satisfy the prejudice prong, we need not address the performance of counsel prong:

Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069. This Court, on prior occasions, has determined a claim of ineffective assistance of counsel based upon only the prejudice prong. For example, in *Olsen v. State*, 2003 WY 46, 67 P.3d 536 (Wyo.2003), we assumed that Olsen's counsel rendered deficient legal assistance but reasoned:

Despite the lack of record, we do not find that the assumption that counsel's performance was deficient leads to the conclusion that the defense was prejudiced. To show that deficient performance prejudiced his defense, the defendant must demonstrate that, when the totality of the circumstances is considered, there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability

is a probability sufficient to undermine confidence in the outcome of the trial.
Id. at ¶ 81.

[26][27] [¶ 27] Rutti has claimed that the record is insufficient to determine whether two of his defense counsels provided legally effective assistance. Rutti presented two motions to this Court requesting we grant a partial remand in order for the trial court to hold an evidentiary hearing on the issue. This Court denied both motions. An evidentiary hearing is only required when serious and specific allegations of legal ineffectiveness are sufficiently stated and documented to show a real and substantial issue. *Calene v. State*, 846 P.2d 679, 687, 693 (Wyo. 1993). A substantial issue regarding legal ineffective assistance of counsel only exists when serious and specific allegations are presented supporting both prongs of the Strickland test for ineffectiveness. *Calene* presented allegations that, if true, would have supported both the performance and the prejudice prongs of Strickland. Thus, the *Calene* Court remanded the case for the trial court to specifically determine, in the first instance, whether *Calene* could present sufficient evidence that his counsel was legally ineffective.

[¶28] The definitive problem with Rutti's ineffective assistance of counsel claims is that he has not presented any objectively plausible argument supporting the prejudice prong. Rutti does not argue that "absent the error, the outcome of a trial would have been more advantageous to the client than the result of his plea." In his affidavit submitted to this Court in support of his motion for partial remand, Rutti does not even make a claim that he would not have accepted the plea agreement had his counsel's performance been different, let alone that the ultimate outcome of the proceedings would have been more favorable to him. While Rutti suggests errors, Rutti makes no allegation of specific prejudice in his affidavit. Even in his brief, Rutti only presents conclusory allegations of prejudice.

[¶ 29] Because Rutti has failed to present to this Court serious and specific allegations supporting both prongs of the *Strickland* test for ineffectiveness, there is no support for a remand. The allegations Rutti has presented to this Court, even if true, simply do not support a claim of ineffective assistance of counsel. Further, because this

case does not present even a close argument on whether a remand is required, we determine that it is * 408 not appropriate for this Court to use this appeal to analyze the remand procedure generally. Thus, we will not further address Issue V as presented by Rutti.

[¶ 30] Rutti's ineffective assistance of counsel claims on appeal must fail for the same reason Rutti's motions for partial remand failed. Even if we assume, for the sake of further discussion, that Rutti's counsels did not function as reasonably competent attorneys under like circumstances, the record extant discloses no prejudice as required pursuant to Strickland and its progeny. On appeal, Rutti's arguments relating to prejudice in accepting the plea bargain are based on the fact that he believes he has legal defenses to Counts I and II. Even if he does, and his defense counsels were completely ignorant of these legal defenses, [FN8] Rutti would still face Counts III and IV, the two counts of third degree sexual assault. Each count of third degree sexual assault carries a maximum penalty of fifteen years. Rutti admitted he committed the two acts of third degree sexual assault. The victim, MA, corroborated Rutti's admission in interviews MA gave to law enforcement officers.

FN8. As various discussions elsewhere in this opinion suggest, however, it is doubtful that defense counsels performed deficiently on the legal issues raised by Rutti as issues of ineffectiveness in his appellate brief.

[¶ 31] Rutti makes absolutely no argument that the outcome of a trial would have produced a more advantageous result than the plea agreement. Indeed, given Rutti's admission and MA's statements, there is little doubt that Rutti would have been convicted on both counts of third degree sexual assault had he gone to trial. Instead, a package deal was negotiated in which the State agreed to drop one of the counts of third degree sexual assault, one count of soliciting a minor (carrying a maximum penalty of five years) and stand silent at sentencing in return for Rutti's plea of guilty to only one count of third degree sexual assault and one count of sexual exploitation of a child (carrying a maximum penalty of twelve years). Wyo. Stat. Ann. § 6-4- 303(c) (LexisNexis 2003). The result of the plea agreement was extremely advantageous to Rutti.

[¶ 32] Under the totality of the circumstances, Rutti has not met his burden of demonstrating the existence of a reasonable probability that, absent the alleged deficiencies of his defense counsels, the result of the proceedings would have been more favorable to him. This Court has confidence that the outcome was more than fair to Rutti and that the proper functioning of the adversarial process was not undermined by defense counsels' respective performances. Whatever the actual conduct of Rutti's defense counsels may have been, Rutti suffered no prejudice and actually benefited from a very advantageous plea agreement. Ultimately, Rutti, when given the opportunity at the hearing on his motion to withdraw his guilty pleas, presented no objective, plausible reason why he would have made a strategic decision to reject the proffered plea agreement and take his chances at trial. [FN9] We therefore reject Rutti's claim that he received ineffective assistance of counsel at any point in the lower court proceedings.

FN9. Rutti testified at his change of plea hearing that he wanted to go to trial on all four counts even though he knew he might lose at trial. Rutti testified that he wanted to prove his legal innocence. While this statement might arguably apply to Counts I and II of the Information, it has no application to Counts III and IV, and therefore does not objectively support any prejudice in accepting the package plea agreement.

Prosecutorial Misconduct

[28][29][30][31][32] [¶33] Rutti complains of several instances of what he alleges amount to prosecutorial misconduct. Rutti failed to make a contemporaneous objection to any of the alleged instances of prosecutorial misconduct. The review of this Court, therefore, is limited to review for plain error pursuant to W.R.Cr.P. 52(b). Plain error exists when 1) the record is clear about the incident alleged as error; 2) there was a transgression of a clear and unequivocal rule of law; and 3) the party claiming the error was denied a substantial right which materially prejudiced him. *Sandy v. State*, 870 P.2d 352, 358 (Wyo.1994). The burden of proving plain error rests with the criminal defendant. "It is the defendant *409 rather than the Government who bears the burden of persuasion with respect to prejudice. In most cases, a court of

appeals cannot correct the forfeited error unless the defendant shows that the error was prejudiciaL" *United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 1778, 123 L.Ed.2d 508 (1993) ; see also *Scheikofiky v. State*, 636 P.2d 1107, 1110 (Wyo.1981) ("To show plain error, appellant has to show a violation of a clear and unequivocal rule of law and has to show that she has been materially prejudiced by that violation. "). Our review for plain error is discretionary. "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936); *see generally Manes v. State*, 2004 WY 33, ¶ 8, 86 P.3d 1274, ¶ 8 (Wyo.2004). Rutti has not provided a plain error analysis for his claims of prosecutorial misconduct.

[¶ 34] Rutti's first claim of prosecutorial misconduct consists of statements made by the prosecutor at Rutti's hearing on his motion to withdraw his guilty plea. The record clearly reflects that the prosecutor did make statements regarding Rutti's activities that were factually incorrect. In remarking on how strong the case against Rutti was, the prosecutor stated that Rutti had set up an in-person meeting with the DCI agent and had shown up at the designated meeting place. Rutti never personally met with the DCI agent pursuant to their internet chats. Rutti did, however, meet with MA.

[¶ 35] The only rule of law Rutti claims was violated was ABA standards that state that a prosecutor should never knowingly misrepresent evidence to the court. We need not decide whether there is a clear and unequivocal rule of law at issue, because even if there is, Rutti has not proven that such a rule was violated. The record does not reflect that the prosecutor made these factually incorrect remarks knowingly. It may have been a simple mistake with regards to the actual facts of Rutti's conduct. We do not mean to imply that this Court condones any attorney appearing before a court unprepared and not cognizant of the facts of the case before the court. We only hold that, under the specific facts of this case, we do not interpret the prosecutor's misrepresentation of the facts as violating a clear and unequivocal rule of law as argued by Rutti.

[¶ 36] Even without regard to the prosecutor's mens rea, however, Rutti still cannot prove prejudice. There certainly was no prejudice at the hearing on Rutti's motion to withdraw his guilty plea because the State [mished its presentation with the comment that the State had no objection to the trial court allowing Rutti to withdraw his guilty plea. The only allegation of prejudice put forth by Rutti in his appellate brief is that the judge stated a similar mistake of fact during the sentencing hearing. As Rutti's brief concedes, however, later in the sentencing hearing the trial court made it clear that it was referring to the count involving MA, not the DCI agent, thus signifying that the judge knew the correct facts. Rutti admitted he came to Cheyenne and had sexual contact with MA. The semantical mistake made by the trial court in its recitation of the facts was in no way material to the sentence ultimately received by Rutti.

[33] [¶ 37] Rutti's other claim of prosecutorial misconduct is that the prosecutor did not inform the trial court that two counts in the Information did not constitute crimes. Rutti argues that neither the sexual exploitation of a child by delivery of child pornography charge nor the solicitation of a minor charge are legally supportable. We disagree. Rutti's argument regarding the sexual exploitation of a child by delivery of child pornography count has already been discussed. The statute upon which this count is based is not facially overbroad. Thus, Rutti's allegation of prosecutorial misconduct with respect to this charge is unsupported.

[¶ 38] Rutti also claims that it is legally impossible for him to have violated § 14-3-104 (solicitation of a minor) under the facts of this case. Rutti argues that, since the DCI agent was not a minor, he legally could not have violated the statute. We need not decide *410 the issue because, even if Rutti is correct in this assertion, Rutti is only partially correct. While it might not be possible to convict Rutti of actually violating the statute since he did not, in fact, solicit a "minor," he allegedly did attempt to solicit a minor. Legal impossibility is not a defense to attempt. Under Wyoming law, a person is guilty of attempting to commit a crime if "[h]e intentionally engages in conduct which would constitute the crime had the attendant circumstances been as the person believes them to be." Wyo. Stat. Ann. § 6-1-30 1 (a)(ii) (LexisNexis 2003). Rutti

allegedly believed he was chatting with a minor. As such, he could be prosecuted for attempted solicitation of a minor. *See generally Cashatt v. State*, 873 So.2d 430, 436 (Fla.Dist.Ct.App.2004) ("A person is guilty of an attempted child solicitation if the evidence demonstrates that he had a specific intent to commit the substantive offense and under the circumstances as he believed them to be took actions to consummate the substantive offense, even though circumstances unknown to him made completion of the substantive offense impossible, and the fact that the receiver of the 'luring' communications was an adult undercover agent posing as a child is irrelevant to the culpability of the sender of the communications for attempting to lure a child to commit an illegal sexual act. ")

[¶ 39] Further, Rutti admitted to soliciting MA during the course of their Internet chat. The Information could have been amended to charge attempted solicitation and a legally supportable count of solicitation could have been added. So, while the prosecutor may have been mistaken in charging Rutti with solicitation of a minor with regard to Rutti's contact with the DCI agent, there was no prejudice to Rutti because his conduct did support an attempt charge as well as a solicitation charge with regard to MA. *See generally Laughner v. State*, 769 N.E.2d 1147, 1155 (Ind.Ct.App.2002) (state allowed to amend Information to charge attempted solicitation as versus solicitation when "victim" of internet solicitation was adult undercover law enforcement agent). Any mistakes as alleged by Rutti do not amount to plain error.

Breach of Plea Agreement by the State

[34] [¶ 40] Rutti argues that the State breached the plea agreement by dismissing two counts against him without prejudice. The plea agreement was entered in open court on May 20, 2002. One term of the plea agreement was that, in return for Rutti pleading guilty to two counts of the Information, the State would dismiss the other two counts. The record is silent on whether the dismissals were to be with or without prejudice. On May 23, the trial court dismissed two counts of the Information without prejudice as requested by the State. On appeal, Rutti argues that the plea agreement required the counts be dismissed with prejudice and that the State breached the

plea agreement by having the counts dismissed without prejudice. Rutti never presented this argument to the trial court.

[¶ 41] Rutti's first hurdle, then, is to prove plain error. Once again, "[p]lain error will not be assigned unless: (1) the record clearly reflects the incidents urged as error; (2) appellant is able to demonstrate violation of a clear and unequivocal rule of law; and (3) it is shown that a substantial right of the appellant was materially abridged." *Seymour v. State,* 949 Pold 881, 883 (Wyo.1997). In his appellate brief Rutti makes no argument that this issue meets any of the criteria of plain error. We determine that no plain error exists.

[35][36] [¶42] "When a plea of guilty rests to any significant degree on a promise or agreement by the State, that promise must be fulfilled. Whether the prosecutor has violated the plea agreement is a question that is reviewed de novo." *Herrera v. State*, 2003 WY 25, ¶ 8, 64 P.3d 724, ¶8 (Wyo. 2003). A plea agreement is a contract between the defendant and the State and thus general principles of contract law apply to the agreement. "When determining whether a breach of the plea agreement has occurred we: (1) examine the nature of the promise; and (2) evaluate the promise in light of the defendant's reasonable understanding of the promise at the time the plea was entered." *411 *Ford v. State*, 2003 WY 65, ¶11, 69 P.3d 407, ¶ 11 (Wyo.2003) (internal quotation marks omitted).

[¶ 43] Rutti has not shown that the State has breached any material term of the plea agreement. The nature of the promise made is not clear from the record. All the record reflects is that the State agreed to dismiss two counts. There is no mention of whether the dismissal should be with or without prejudice. The State did dismiss the two relevant counts. Rutti did not complain about the manner in which the counts were dismissed until this appeal, almost two years after the counts were dismissed.

[¶ 44] Even if this Court assumes that an intended material term of the plea agreement was for the State to dismiss the counts with prejudice, both the nature of the promise and the reasonable understanding of the promise to dismiss the counts would be that Rutti would not be subject to any further criminal proceedings on the dismissed counts. While it would be better practice for the State to

request dismissal with prejudice, it would not necessarily be required. What would be required is that the State not reme the dismissed counts against Rutti or threaten Rutti that it will reme the counts to gain an impermissible advantage. Rutti has not alleged that the State threatened him in any manner with the reinstatement of the dismissed counts. *See generally People v. Soto*, 62 Mich.App. 370, 233 N.Wold 545 (1975) (failure to immediately dismiss charges as agreed to in a plea agreement might result in impermissible chilling of appellate rights).

[¶ 45] Pursuant to general contract law, under these circumstances, reming the dismissed counts arguably might constitute a breach of the plea agreement. Under these facts, however, this Court will not elevate form over substance. The State did not breach the plea agreement by requesting the trial court dismiss the relevant charges without prejudice.

CONCLUSION

[¶ 46] Rutti has not presented sufficient evidence to support any of his claims of error. The application of the decision of the United Stated Supreme Court in Ashcroft v. Free Speech Coalition does not render § 6-4-303 facially overbroad. The plea agreement Rutti accepted was extremely favorable for him, countering any suggestion that he was prejudiced by ineffective assistance of counsel. Finally, while the prosecutor might not have conducted this prosecution perfectly, we perceive no prejudicial error as claimed by Rutti. Rutti's conviction and sentence are affirmed.

100 P.3d 394, 2004 WY 133

END OF DOCUMENT

APPENDIX B

Order of of Wyoming Supreme Court Denying Petition for Rehearing Dated December 14, 2004

IN THE SUPREME COURT, STATE OF WYOMING

October Term, A.D. 2004

Judy Pacheco, Clerk

FILED DECEMBER 14, 2004

JAMES P. RUTTI, JR Defendant/Appellant,	)	
vs.	)	No. 03-24 2004 WY 133
STATE OF WYOMING Plaintiff/Appellee.	)	

ORDER DENYING PETITION FOR REHEARING

This matter came before the Court upon appellant's Petition for Rehearing, filed herein November 23, 2004. The Court, having examined the files and record of the Court and having considered carefully the points raised in appellant's Brief in Support of Petition for Rehearing, finds that the petition for rehearing should be denied. It, therefore, is

ORDERED that appellant's Petition for Rehearing, filed herein November 23, 2004, be, and the same hereby is, denied.

DATED this 14th day of December, 2004.

BY THE COURT:
/S/
WILLIAM U. HILL
Chief Justice

APPENDIX C

Judgment and Sentence of the District Court
Dated January 6, 2003

STATE OF WYOMING)
) ss.
COUNTY OF LARAMIE)

IN THE DISTRICT COURT
FIRST JUDICIAL DISTRICT
Docket No. 26-964

FILED JANUARY 6, 2003
GERRIE E.BISHOP CLERK OF THE
DISTRICT COURT

STATE OF WYOMING)
)
Plaintiff,)
)
vs.)
)
JAMES P. RUTTI, JR,)
Date of Birth: 04/01/58)
SSN: 296-58-5568)
)
Defendant.)

JUDGMENT AND SENTENCE OF THE COURT

THE ABOVE-NAMED DEFENDANT, appearing before the Court this 9th day of December, 2002, and he was represented by competent counsel, Will Bierman, for judgment and sentence after having duly pleaded guilty before this Court to the crimes charged in the Amended Information herein, to wit: Exploitation of a Child (Count I) and 3rd begree Sexual Assault (Count Ill), felonies, as proscribed by Wyoming Statute §6+303(b)(iii) and W.S. §6-2-304(a)(i), 1997 Republished Edition; and, defendant was competent to enter a plea and the plea of the defendant was a voluntary plea and not the result of force or threats or of promises apart from any plea agreement;

AND, JAMES P. RUTTI, JR., after having been afforded an opportunity to make a statement in his own behalf and present any information in mitigation of the punishment, was thereupon asked by the Court whether he had anything to say why judgment should not

be pronounced against him; and JAMES P. RUTTI, JR. not having given any good or sufficient reason why judgment of the Court should not be pronounced; and the defendant being previously advised of the nature of the charge, the mandatory minimum and maximum penalties provided by the law, the assessments which may be levied at sentencing, his right to be represented by an attorney at every stage of the proceeding, his right to persist in a plea of not guilty and to proceed to jury trial where the Defendant had the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, the right to subpoena other witnesses and the right against self-incrimination; and the Court being fully advised on all matters pertinent herein;

THE COURT HEREBY FINDS that as to Count III Probation for the DEFENDANT is inappropriate at this time;

IT IS HEREBY ORDERED that JAMES P. RUTTI, JR. is guilty of the crime charged in the Amended Information filed herein and that as to Count I: he be imprisoned and confined in the Wyoming Department of Corrections located at or near the city of Rawlins, Wyoming for a period of not less than three (3) years nor more than five (5) years; that during such confinement he be clothed, subsisted and treated in all respects in accordance with the rules and regulations governing said institution; there to be safely kept until the term of this sentence is fully complied with or until he shall have been sooner discharged in accordance with law; and as to Count III: he be imprisoned and confined in the Wyoming Department of Corrections located at or near the city of Rawlins, Wyoming for a period of not less than four (4) years nor more than seven (7) years; that during such confinement he be clothed, subsisted and treated in all respects in accordance with the rules and regulations governing said institution, there to be safely kept until the term of this sentence is fully complied with or until he shall have been sooner discharged in accordance with law;

IT IS FURTHER ORDERED that JAMES P. RUTTI, JR. shall be given credit against the minimum and maximum sentence in Count III for time served in the Laramie County Detention Facility awaiting disposition of this matter which equals three hundred seventy-two (372) days;

IT IS FURTHER ORDERED that the terms of the confinement imposed above in Count I shall be served consecutive to Count III;

IT IS FURTHER ORDERED that execution of the terms of confinement imposed above in Count I shall be suspended and JAMES P. RUTTI, JR. shall be placed on probation upon this parole/probation release from the terms of confinement imposed in Count III and he shall be permitted to go at large upon his own recognizance, UPON THE FOLLOWING TERMS AND CONDITIONS, TO WIT:

1. DEFENDANT is placed on probation and shall be under the supervision of the State Probation Officer and his successors in office, and shall report to said Officer as directed and the State Probation Officer shall report to the Court with respect to the Defendant;

2. The probation shall continue for a period of Ten (10) years upon the parole/probation release from the terms of confinement imposed in Count III;

3. DEFENDANT shall conform to the rules, regulations and conditions imposed by law, by the Court, and by the Probation Officer and shall sign a Probation Agreement and a Waiver of .Extradition to the State of Wyoming and shall pay for all costs incurred for said extradition to the State of Wyoming in the event of any revocation hearing;

4. DEFENDANT shall obey all local, state and federal laws;

5. DEFENDANT shall report as ordered by his supervising probation agent;

6. DEFENDANT shall not enter any bars or establishment where alcohol is the main source of income;

7. DEFENDANT shall not use or possess alcohol, drugs or controlled substances or associate with those who do and shall, upon the request of law enforcement officers or probation officers submit to all tests and searches relative to the use thereof;

8. DEFENDANT shall submit himself for a clinical evaluation by an agency specializing in the treatment of substance abuse and if so required by that agency he shall enroll in and successfully complete a substance abuse program, at his expense, if recommended to do so by his supervising agent;

9. DEFENDANT shall have no contact with any minors under the age of eighteen (18) years;

10. DEFENDANT shall seek and maintain full-time employment and shall pay just debts and shall not terminate employment without probation officer's consent;

11. DEFENDANT shall fully cooperate and attend any and all sexual abuse counseling at his expense as may be required by his supervising probation agent;

12. DEFENDANT shall have no Internet access;

13. DEFENDANT shall pay within ten (10) days to the Victim's Compensation Fund, as required by W.S. §1.40-119(a), 1997 Republished Edition, the sum of one hundred dollars ($100.00) by cash, certified check or money order payable to the Clerk of the District Court, Third Floor, Laramie County Government Complex, Cheyenne, Wyoming;

14. DEFENDANT shall repay the State of Wyoming, Public Defender's Office, for all expenses and services provided by his appointed attorney, Will Bierman, in the amount of One hundred dollars ($100.00), pursuant to the State of Wyoming Public Defender's standard fee schedule, as required by W.S. §7-6-106(d), 1997 Republished Edition, such to be paid within said Defendant's probationary period, according to a plan to be prepared by the Department of Probation and Parole and submitted to the Court for approval;

IT IS FURTHER ORDERED that the Defendant shall pay a court automation fee of ten dollars ($10.00).

IT IS FURTHER ORDERED that JAMES P. RUTTI, JR. shall provide a suitable DNA sample as required under W.S. §7-19-401 through W.S. §7-19-406, if such sample is required by the Wyoming Department of Corrections.

IT IS FINALLY ORDERED that JAMES P. RUTTI, JR. be remanded to the custody of the Sheriff of Laramie County and by said Sheriff to be held until such time as the prisoner is transferred by the Department of Corrections to the Warden; keeper or proper Officer in charge of the Wyoming State Penitentiary in the manner and within the time required by law and that he

be kept and detained by the Warden according to this Judgment and Sentence.

DATED this 6th day of January, 2003.

/s/
Hon. E. James Burke
District Court Judge

THE PEOPLE OF THE STATE OF WYOMING:

TO:

The Sheriff of Laramie County and the Warden and Officer in charge of the Wyoming Department of Corrections, at Rawlins, Wyoming,

GREETING:

WHEREAS, JAMES P. RUTTI, JR. has been duly convicted in the District Court of said County and State of the crime of Third Degree' Sexual Assault (Count III) and Judgment has been pronounced against him that he be punished by imprisonment in the Wyoming Department of Corrections at Rawlins, Wyoming, for the term of not less than four (4) years nor more than seven (7) years, with credit given against the minimum and maximum sentence for time served in the Laramie County Detention Facility, which equals three hundred seventy-two (372) days, all of which appears of record as is shown by the certified transcript of judgment endorsed hereon and made a part hereof;

NOW THIS IS TO COMMAND YOU, the said Sheriff of Laramie County to take, keep and safely deliver the said JAMES P. RUTTI, JR. into the custody of the said warden or other Officer in charge of said prison, within the time provided by law.

AND THIS IS TO COMMAND YOU, the Warden or other Officer in charge of said prison, to receive of and from said Sheriff the said JAMES P. RUTTI, JR. convicted and sentenced as aforesaid, and him the said JAMES P. RUTTI, JR., keep and imprison in said prison for the term above stated.

AND these presents shall be your authority for the same, HEREIN FAIL NOT.

WITNESS, Honorable E. James Burke, Judge of the said District Court, this 6th day of January, 2003.

ATTEST, my hand and Seal of said Court, the day and year last above written.

/s/ Honorable E. James Burke

APPENDIX D

Order of Wyoming Supreme Court Denying Motion for Partial Remand for Evidentiary Hearing to make factual record in support of Sixth Amendment Claims Dated August 5, 2003

IN THE SUPREME COURT, STATE OF WYOMING

April Term, A.D. 2003

Judy Pacheco, Clerk

FILED AUGUST 5, 2003

JAMES P. RUTTI, JR Defendant/Appellant,	)	
vs.	)	No. 03-24
STATE OF WYOMING Plaintiff/Appellee.	)	

ORDER DENYING MOTION FOR PARTIAL REMAND

This matter came before the Court upon Appellant's Motion for Partial Remand, filed herein July 15, 2003. Having fully considered the motion and the file, the Court find that the thrust of this motion seems to be that counsel was ineffective in failing to challenge, overbroad, the constitutionality of portions of the Wyoming statute prohibiting sexual exploitation of children, Wyo.Stat.Ann. § 6-4-303. However, because appellant may attempt to challenge, as overbroad, that statute in this appeal, *Ochoa v. State,* 848 P.2d 1359, 1363 (Wyo. 1993), and because appellant's motion does not otherwise substantially support a claim of ineffective assistance of counsel, *Calene v. State*, 846 P.2d 679, 692 (Wyo. 1993), the Court finds the motion should be denied. It is, therefore

ORDERED that Appellant's Motion for Partial Remand, filed herein July 15, 2003 be, and hereby is, denied; and it is further

Ordered that briefing in this matter is resumed and appellant's brief shall be filed within thirty (30) days of the date of this order.

DATED this 5th day of August, 2003.

BY THE COURT:
/S/
WILLIAM U. HILL
Chief Justice

APPENDIX E

Order of Wyoming Supreme Court Denying Motion to Reconsider Denial of Partial Remand and Denying Renewed Motion for Partial Remand to make Evidentiary Hearing to make factual record in support of Sixth Amendment Claims Dated September 23, 2003

IN THE SUPREME COURT, STATE OF WYOMING

April Term, A.D. 2003

Judy Pacheco, Clerk

FILED SEPTEMBER 23, 2003

JAMES P. RUTTI, JR Defendant/Appellant,	)	
vs.	)	No. 03-24
STATE OF WYOMING Plaintiff/Appellee.	)	

ORDER DENYING MOTION TO RECONSIDER DENIAL OF PARTIAL REMAND
AND
ORDER DENYING RENEWED MOTION TO PARTIAL REMAND

This matter came before the Court upon appellant's Motion to Reconsider Denial of Partial Remand and Renewal of Motion for Partial Remand, filed herein August 29, 2003. Having fully considered the motion and the file, the Court finds the motions should be denied. It is, therefore

ORDERED that appellant's Motion to Reconsider Denial for Partial Remand and Renewal of Motion for Partial Remand, filed herein July 15, 2003 [sic] be, and hereby are, denied.

DATED this 23rd day of September, 2003.

BY THE COURT:
/S/
WILLIAM U. HILL
Chief Justice

APPENDIX F

Affidavit of James P. Rutti in Support of Motion for Partial Remand
Dated August 19, 2003.

Lori L. Brand
Gay Woodhouse Law Office
211 West 19th Street, Suite 308
Cheyenne, Wyoming 82001
(307) 432-9399

Attorney for Defendant

IN THE SUPREME COURT, STATE OF WYOMING

JAMES P. RUTTI, JR.	)	
	)	
Appellant (Defendant),	)	
	)	
vs.	)	Case No. 03-24
	)	
STATE OF WYOMING	)	
	)	
Appellee (Plaintiff).	)	

AFFIDAVIT OF APPELLANT JAMES P. RUTTI, JR. IN SUPPORT OF MOTION FOR PARTIAL REMAND

I, James P. Rutti, Jr. being first duly sworn to depose upon my oath, do depose and state as follows:

1. The statements contained in this affidavit are based upon my personal knowledge and observations.

2. On December 3, 2001, I was arrested at my home in Laramie, Wyoming. On that date I was told to come outside of my apartment because my car had been taken. When I did, I was immediately surrounded by many law enforcement officers with guns drawn who were shouting and yelling at me. A law enforcement officer punched me very hard in the kidneys and causing my bladder to fail. Another officer pulled on the arms of my coat causing my sleeve to tear off. The officers would not tell me

what I was being arrested for even though I asked them repeatedly. My roommate was home during this raid and the police likewise stuck their guns in his face when they entered our apartment. I do not know what my roommate witnessed about the assault upon me.

3. I was then handcuffed very tightly causing the circulation to fail in my hands. I was transported briefly to the Albany County jail whereupon Agent Waters and Curran told me to come with them "we were going for a ride." I was frightened at this point, not knowing where the police were taking me or whether I would be beaten.

4. Once in the vehicle I was questioned repeatedly by Agent Waters and Curran. I was very frightened and told the officers over and over that I was "pleading the fifth" and didn't want to say anymore. Whenever I gave that response, Agent Waters very deliberately placed his hand on his gun and turned to look at me. Agent Curran just kept saying "I can't hear you talk louder." I do not recall ever being given any Miranda warnings by any law enforcement officer until I arrived in Cheyenne and was then given them.

5. I told my first appointed trial counsel, Barbara Parnell of the Public Defender's Office, about the general circumstances of my arrest, the statements I gave during it and the items that were seized. However, to my knowledge no motions to suppress my statements and the evidence it led to were ever filed on my behalf by any of my attorneys.

6. One of the charges brought against me was for sending a sexual photo of a young woman over the internet to a DCI Agent posing as a fifteen year old named "Candy," after repeated requests to do so by the Agent. The prosecutor and police alleged that the young woman appeared to be a minor. At my preliminary hearing, DCI Agent Waters testified saying the picture was on a computer disk. To my knowledge none of my attorneys ever received a copy of the disk or viewed the picture which constituted the crime for which I was charged and advised to plead guilty.

7. When I was in jail the U.S. Supreme Court issued its opinion in Ashcroft v. Free Speech Coalition. We inmates who were charged with similar cases were very interested in the decision. We heard the head of DCI on the radio talking about the importance of the case and what it meant in Wyoming.

8. At some point some months after my arrest, I received a letter from Barb Parnell saying that she was leaving the Public Defender's Office and that Mr. Dion Custis would be handling my case. Ms. Parnell and I had decided that I would go to trial.

9. The first time I met with Mr. Custis, we only spoke for about 15 minutes. He told me that he undertakes a thorough investigation and would look into my case.

10. I met with Mr. Custis, approximately a week later. He wanted me to accept a plea agreement. He told me that "these cases don't win" and that I was facing 10 years on each count. I asked him about the U.S. Supreme Court case that had said the statute was unconstitutional, he told me, "our Supreme Court held it constitutional, now just sign the papers."

11. After the meeting where I signed the papers but well before the rearraignment I called Mr. Custis' office and told him I did not want to take the plea deal and wanted to go to trial. I said I did not think it was a good deal because there were no set numbers of years to be recommended or anything. I did not want to take the plea. Mr. Custis then said he'd see what he could do and then he later informed me that the prosecutor would stand silent at my sentencing.

12. When I would call Mr. Custis he did not return my calls, when I finally spoke to him on the phone about taking back my plea he said, "you're putting me in a bind." He also said, "I'm a lawyer just do what I said." I just felt like I had no other choice than to do what he said.

13. I requested several times for my attorney to come see me, but he never came. If I saw him at the jail visiting another inmate he would not talk to me or answer my questions.

14. Just a few days before my rearraignment, Mr. Custis came to see me. He wanted to make sure I was going through with the guilty plea. By this time, the jail law library had received an updated copy of the federal reporter which contained the Ashcroft decision. I borrowed the reporter from the inmate using it and showed the case to Mr. Custis. I said look the language is just the same as the Wyoming statute's language. I showed him exactly what I was talking about. My research at the jail law library made me think it was important. Mr. Custis said, "that's the federal statute it doesn't mean anything." He just kept insisting that the guilty plea was the best thing for me and I felt I had to listen to him because he was a lawyer. I didn't know what else to do. He never even acted like he would investigate the issue.

15. A few days after my rearraignment I called Mr. Custis about withdrawing the plea I said I just wanted to go to trial, but he kept saying things like, "you're putting me in a bind."

16. Finally when Mr. Custis refused to listen to me or do what I asked, I filed my own Motion to Withdraw the Guilty Plea on October 9, 2002.

17. I don't think Mr. Custis was aware of my Motion, when we went to court for the sentencing, he told me that he was going to fight really hard for me to get probation. At the hearing, the Judge told Mr. Custis about my Motion and took him off my case and appointed Diane Lozano of the Public Defender's Office.

18. After that Diane Lozano was supposed to be my attorney, but Marion Yoder appeared to represent me at the hearing on my Motion to Withdraw my Guilty Plea stating Ms. Lozano had a conflict. I asked her about the Ashcroft case, but she said we were only there to talk about the guilty plea. The Judge denied the Motion.

19. Later I was represented at sentencing by Will Bierman of the Public Defender's Office.

20. On March 26, 2002, I personally filed a Motion for Speedy Trial, however none of my attorneys ever talked to me about it and I was in jail for over a year before I was sentenced.

FURTHER AFFIANT SAYETH NAUGHT.

DATED this 19th day of August, 2003.

/s/ James P. Rutti, Jr.

STATE OF WYOMING)
)ss.
COUNTY OF CARBON)

The foregoing Affidavit in Support of Motion for Remand was subscribed to and sworn before me upon the oath of James P. Rutti, Jr. this 19th day of August, 2003.

Witness my hand and Seal:

/s/ Michelle Burgess
NOTARY PUBLIC

My Commission Expires: March 3, 2007

SEAL: